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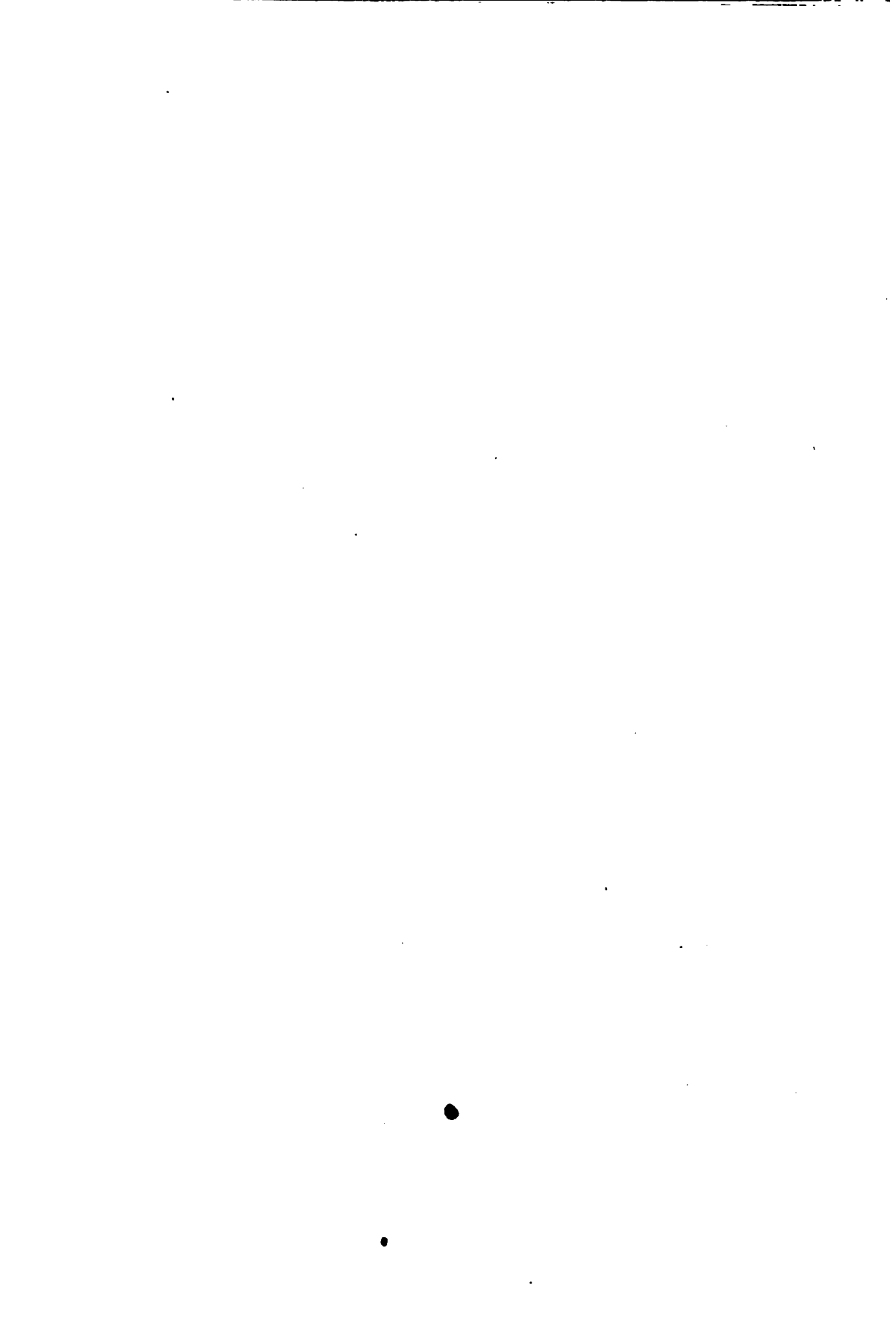
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OF

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THE LANING PRINTING COMPANY.  
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## PREFACE.

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This volume is a reprint of the cases decided by the state courts of Ohio, found in the Cleveland Law Record, published in 1856, and the Cleveland Law Reporter published 1878 to 1881. The three original volumes are compressed into one, as all editorial, correspondence, cases decided in other states, and out of date matter in the periodicals as first issued, have been omitted.

This volume is the fourth of a series of reprints embracing the Western Law Journal, Western Law Monthly, Weekly Law Gazette, Cleveland Law Record, and Cleveland Law Reporter, and the American Law Record, undertaken and carried on at large expense, by the publishers.

As the original volumes have been out of print for a long time, and copies are scarcely obtainable at any price, it has been thought that a republication of these volumes was now called for, as, without them no Ohio Library is complete.

As citations to these authorities are found in the different editions of the Walker and Bates, and Bates Ohio Digest, and come constantly under the eye of every judge and attorney who is looking up Ohio judicial precedents, it is believed the bar will consider our adventure a desirable one, and patronize it accordingly.

The cases are a full and faithful transcript of the originals. No case of in Ohio state court has been omitted, or abridged in the least, and no note or comment has been left out.

Where no titles were given in the original prints, we have supplied them, and they will be found in black letters, at the beginning of the cases. Many of the cases in the original periodicals had no syllabi, and where necessary we have supplied them. The foot notes showing cases affirmed, overruled, and considered, are valuable additions to the cases. The work has been carefully compared, proof read, and the decisions may be relied upon as being as authentic as the originals.

The volumes follow each other in the same manner, and the cases appear in the same order as printed originally.

The original paging is maintained, the volume number being at the head of the page, and the page number given over the top of the pages, and also inserted in the margin, in bold type. By observing these bold face figures any desired citation can be as readily located as in the original volume. The pagings of this book are placed at the bottom of the pages.

By reference to the Table of Cases the page of this book where a case is reprinted, can be located, from any citation to the original volume and page.

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REPRINT

OF

# The Cleveland Law Record

DEVOTED PRINCIPALLY TO THE

## Report of Leading Cases

IN THE SEVERAL COURTS IN OHIO AND ESPECIALLY TO THOSE IN THE

District Court of Cuyahoga County, O.

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By J. T. BISHOP,

Attorney and Counsellor at Law.

---

CLEVELAND,

1856.

1 C. L. R.







**DISTRICT COURT, CUYAHOGA COUNTY,**

**OCTOBER TERM, 1855.**

**REPORTS OF CASES DECIDED IN THIS COURT BY JUDGE RANNEY OF THE  
SUPREME COURT, AND STARKWEATHER, FOOTR, FITCH AND OTIS,  
JUDGES OF THE COMMON PLAS. THE REPORTS  
WERE SUBMITTED TO AND APPROVED BY  
THE JUDGES RESPECTIVELY WHO  
DELIVERED THE OPINIONS.**

---

**COLLECTION OF WATERCRAFT CLAIMS.**

**7**

**CRAWFORD & CHAMBERLIN V. SCHOONER ERIE.**

1. A master of vessel cannot by any contract of his, as such master, bind the vessel so as to make her liable to seizure under the water craft law of Ohio, "providing for the collection of claims against steamboats and other water craft, and authorizing proceedings against the same by name," (Swan's Statutes, 185), when the transaction is not within the line of the master's duty.
2. It is not within the duty of the master, in addition to the transportation of flour, to go ashore at the point of destination and sell the property as the factor of the owner of it.
3. Money paid for insurance, on property shipped under such contract, and money advanced to pay for supplies for such craft, are not chargeable to the vessel.

This was a claim on a due bill, signed by the master of defendant, purporting to be for flour, provision, supplies, and repairs furnished on and to defendant.

It appeared in evidence that the master applied to plaintiffs to purchase flour, but they would not trust him, but would ship some flour, and all above a certain price the master might have for carrying the flour. The flour amounted to \$150, the balance was made up of insurance on the flour and a small amount of money advanced for supplies.

The flour was to be taken on defendant and sold by the master at the Saut, and he was to account to plaintiffs \*at \$2.50 per bbl.

The flour was sold at the Saut by the master, but the money 8  
not paid over.

Bolton, Kelly & Griswold, for defendant.

1. Claimed that the due bill was not sufficient to enable plaintiffs to recover unless accompanied by proof that it was given for such consideration as would make the defendant liable under the

water craft law, and cited 20, Ohio R., 68.

2. That the contract under which the flour was taken was one which the master, as such, had no right to make, and cited *Flanders on Shipping*, 165; 8 *Greenleaf*, 356; 2 *Eng. Law and Eq.*, 337.

Messrs. Prentiss, for plaintiff, claimed this case came within the rule established in case of the schooner *Argyle*, 17 Ohio R., 460.

The court, by RANNEY, Supreme Judge, held—

That the flour was transported according to agreement, and disposed of according to agreement; that this case did not come within the rule laid down in case of schooner *Argyle*, 17 Ohio R., 460, or case of steamboat *Owen*, 2 Ohio State R., 142.

The first case was stretched to the utmost verge which the law allows; that case decides "that a contract by the captain to carry goods and collect the price from the consignee is binding on the vessel." The money was paid in that case to the master, but he failed to pay it over to the vessel's owners, or to the owners of the goods; and it was held that the plaintiff could hold the vessel under the water craft law for the amount. In the case of the *Owen*, the master delivered the goods and did not \*collect the purchase price  
9 of the goods. The goods were only to be delivered on condition of the charges on the goods being paid, they having been delivered without such payment, the vessel was held liable for a breach of the contract of shipment.

In the case at bar, the master of the vessel was not only to transport the flour to its destination, but was then to go on shore and sell the property, as factor of the plaintiffs. This was not within the line of duty of the master, as such, and he could not bind the vessel thereby. The insurance and money advanced are not chargeable to the vessel.

Judgment for defendant.

---

### ENDORSEMENT OF NOTES.

C. L. SEYMOUR V. J. FRANCISCO, ADMINISTRATOR, AND JACOB FRANCISCO.

An endorsement on a note in these words: "Notice of presentment, demand and protest waived," is not only a waiver of a demand of payment, but of notice of non-payment to the indorser, at the maturity of the note.

Claim for money by plaintiff on three notes, each for \$133.33, drawn by P. S. Francisco, and endorsed by Jacob Francisco. Over endorser's name was written "Notice of presentment, demand and protest waived."

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Mutual Insurance Co. v. Steamboat America.

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The notes were payable at bank. No demand of payment was made, or notice of nonpayment given to the endorser at the maturity of the notes, nor were the notes at the bank when they matured.

J. C. Grannis, attorney for plaintiff, claimed that demand of payment and notice of nonpayment had been waived by the endorser.

\*That it was sufficient if the note was at the place where payable at the time of maturity, and no demand in that case is necessary, and that fact need not be averred or proved. 10

Some other points were also made, but not decided.

C. Stetson, attorney for defendant, claimed that there was no waiver of demand of payment at the time of the maturity of the notes.

RANNEY, Supreme Judge, delivered the opinion of the court, holding that although a mere literal construction of the waiver by the endorser, which he had made, would not excuse the holder from making a demand, yet, taking the whole together, it could not mean anything less than that the endorser waived both demand of payment and notice of nonpayment of the notes, when they should become due; that the language used is inconsistent with the view that notice of nonpayment merely was intended to be waived.

Judgment for the plaintiff.

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**ATTACHMENT OF WATERCRAFT.****BUFFALO MUTUAL INSURANCE COMPANY V. STEAMBOAT AMERICA.**

An attachment against a steamboat, under the water craft law of Ohio, will be dismissed on motion, where articles of furniture of a vessel have been seized under the attachment, if it appears in evidence that the vessel, before the seizure, was wrecked and no longer existed as a water craft.

This was a motion to dismiss attachment issued under the Ohio water craft law.

Reasons urged in favor of the motion, were—

1. That the defendant had been wrecked before the attachment was served, and no longer existed as a water \*craft; and the attachment had only been served on certain articles of furniture 11 and machinery saved from the wreck.

2. The return of the sheriff did not show that the craft had been seized.

It was argued by counsel, that the steamboat, before issuing the warrant of seizure, had become a total wreck, and no longer existed as a water craft; and that the articles seized by the sheriff

had been saved from the wreck, and had formerly belonged to the boat.

ORIS, Judge, delivering his opinion, held—

The only right given to the plaintiff was under the water craft law; that this law gives no right to proceed against a craft by name when it no longer exists for the purposes for which it was intended; that if it had become a total wreck, then it was like a deceased individual, no longer liable to be seized or sued. Motion to dismiss granted.

For the motion, Spaulding and Parsons—against, Prentiss, Prentiss and Newton.

### RIGHT OF ACTION FOR DEATH BY WRONGFUL ACT.

LAWRENCE HALLORAN, ADMINISTRATOR OF JOHN HALLORAN,  
DECEASED, V. CLEVELAND, PAINESVILLE & ASHTA-  
BULA RAILROAD COMPANY.

1. Under the act of the legislature of Ohio, allowing compensation in cases, where death has been caused by the wrongful act, neglect or default of another, if there be no widow or next of kin of the deceased, having a legal interest in his life, an action cannot be maintained.
2. The petition must show there is such widow or next of kin of the deceased, as had a pecuniary interest in the life destroyed.

This action was brought by plaintiff, as administrator of John Halloran, deceased, to recover damages of the defendants, under the act allowing compensation in cases \*where death has been  
12 caused by the wrongful act, neglect or default of another. The facts in the case, as established by proof, were, that John Halloran, a boy between five and six years of age, was on the railroad track of the defendants, in the month of April, 1854, and that while on said track, he was run over by the passenger train of the defendants, and so injured that he died in a few hours thereafter. The petition set forth that the next of kin to the deceased was an infant sister, which the proof showed at the time of the injury was about one year old.

The circumstances attending the injury were detailed in evidence, and thereupon the plaintiff rested his case.

The defendants, then, by their counsel, moved the court for a non-suit, on the ground that the relation of brother and sister was not such in law as would legally create a pecuniary interest in the life of either, and that consequently, the death of either, was not to be any pecuniary loss to the other, nor establish any right to

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Halloran, Admr. of Halloran, v. Railroad Co.

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compensation under the statute. The motion was argued by F. T. Backus and J. Adams.

The court, FITCH, Judge, in deciding upon the motion, held—

1. That the action, although prosecuted in the name of the administrator, must be exclusively for the benefit of the widow or next of kin, and if there be no widow or next of kin the action cannot be maintained.

2. That the petition and proof must set forth and show that there is such a widow or next of kin to deceased as is by law entitled to the compensation sought.

3. That the relation between the deceased and the person claiming compensation must be such as to create some pecuniary interest in the life destroyed. The verdict of the jury is to compensate the widow and next of kin for the pecuniary injury resulting to them from the death; and the relation must be such as in law would create an obligation to support, or some legal interest which during the lifetime of the deceased could be enforced. The simple relation of brother and sister does not, of itself, create any such obligation or interest, and in the absence of all proof upon that subject the action cannot be sustained; the jury have no damages to estimate, for there is no one appearing in the case to have sustained any pecuniary loss.

4. That the clause of the statute, prescribing the manner of distributing the compensation, must be taken in connection with the first section, giving the administrator the right of action, and that the administrator cannot recover unless such a state of facts is made to appear, by proof or operation of law, as will create such a relation in the widow, or next of kin, as to give them a legal interest in the life of the deceased, and which, by his death would result in pecuniary loss to the party.

The plaintiff having therefore failed to establish these facts must become nonsuit. Plaintiff moved to set aside the nonsuit, which, after argument, was overruled.

J. Adams and W. Abbey, for plaintiff.

Bishop, Backus & Noble, for defendant.

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**ATTACHMENT.****PRATT ET AL. V. SHERMAN ET AL.****[ERROR.]**

1. In case of foreign attachment under the code, it is not necessary to issue a summons, where it cannot be personally served.
2. To authorize a judgment, there must be either personal service by summons, or proof of notice of publication, before the rendition of judgment.

This was a case of foreign attachment, where an order of attachment was issued from the common pleas, against Pratt, et al., in favor of Sherman, et al., for about \$200. No summons was issued, and on the 14th day of April, 1854, the court rendered judgment in favor of Sherman, et al., v. Pratt, et al. Oct., 1854, Sherman, et al., plaintiffs, filed in the court of common pleas, proof of notice of the pendency of the above case, the case having been previously disposed of. No action of the court was taken on the proof of notice; it was merely filed, substantiated by affidavit that the notice had been published the required time previously to the rendition of the judgment. There was no appearance in the common pleas by defendants.

The court per Fitch, Judge, held—

1. That it was not requisite to issue a summons in cases like the present one, when an attempt at service would be perfectly fruitless, the defendants being beyond the jurisdiction of the court.

2. That to authorize the rendition of the judgment there must be a notice to the defendants by service of a summons, or a constructive service, by publication as required by the code; that neither of said modes of proceeding had been adopted in this case; that the notice \*filed subsequently to the rendering the judgment, 15 was of no avail, as it never had the action of the court thereon. Judgment of the common pleas reversed.

For plaintiffs, Axtell and Prentiss.

For defendants, R. D. Noble.

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**CERTIFICATES OF DEPOSIT GOOD AS NOTES.****CUYAHOGA STEAM FURNACE COMPANY V. G. F. LEWIS.**

1. A certificate of deposit for \$1,150, to draw interest if left thirty days, and payable on return of the certificate properly indorsed, is a good promissory note.
2. The charter of plaintiff, requiring the funds of the company to be used in the manufacture of iron, etc., it could not legally become possessed of such certificate, unless in the course of its legitimate business.
3. If the plaintiff became possessed of such certificate as indorsee, under circumstances sufficient to put it on inquiry as to its character in the hands of the original holder, then the same defense might be made to it as if in the hands of such original holder.
4. Such, also, would be the case if the assignor had indemnified the plaintiff.
5. If demand of payment of the certificate had been made before it was received by plaintiff, it must be treated as an overdue note, and be subject to such defenses as it would be in the hands of the original holder.

"BANKING AND EXCHANGE OFFICE OF G. F. LEWIS, {  
CLEVELAND, March 8, 1853. }

"H. B. Castle has deposited in this office eleven hundred and fifty dollars to the credit of himself. Interest if left thirty days, and payable to his order on return of this certificate properly endorsed.

(Signed) G. F. LEWIS."

"(Endorsed) H. B. Castle."

The plaintiff claimed to recover on this certificate, as a negotiable promissory note.

The defense set up was, that it was not a negotiable note; that it was issued by a mistake, no consideration ever having, in fact, passed between Lewis and Castle for it; \*and that the paper was void; that plaintiff had no right to purchase this paper as it did; <sup>16</sup> that it was chargeable with notice of the want of consideration, and that it took it as an overdue note. The plaintiff claimed as a purchaser for value, without notice of any want of consideration. It was in evidence on the trial that, on the 14th day of March, 1853, Castle called at the office of the plaintiff and wished to dispose of the certificate, as he wanted to use a portion of the proceeds before banking hours. It was in proof that defendant's banking house was in Cleveland, and his office open earlier and later than the banks in Cleveland; that the secretary of plaintiff gave Castle two or three checks on the Commercial Bank of Cleveland, and took the certificate; that he did this to accommodate Castle. It was in

proof that Castle knew of the difficulty about the draft, and that defendant refused to pay it, and that he disposed of it so as to get it in the hands of a purchaser for value, without notice of the want of consideration; that after this was discovered by the secretary of plaintiff, (he having called and demanded payment of the certificate of Lewis,) the secretary called on Castle, and Castle on the secretary giving him his individual note, furnished the secretary with funds to use in place of those which the secretary had given for the certificate—the plaintiff still retaining the certificate, and Castle retaining the *private note* of the secretary.

RANNEY, Supreme Judge, charged the jury as follows:

1. That the certificate of deposit was a good negotiable promissory note, and was to be received by the jury as such; that it was for a sum certain, or capable of being rendered certain; that the provision as to the return of \*the certificate was nothing more  
17 than the law implied, and that therefore the objection made by defendant to the introduction of the certificate, because not negotiable, must be overruled; that the case of Patterson v. Poindexter, 6 Watts & Sargeant, 231, and the case in 4 Law Journal, 527, cannot be recognized as law—the contrary has been held in the United States supreme court, 13 Howard, 213.

2. That the plaintiff's charter, (the 6th section) was as follows: "That the capital stock and funds of said corporation shall be applied exclusively to the manufacture of iron, and other business connected therewith and necessary thereto, and no portion of said funds shall ever be employed in banking purposes."

That the defendant claimed "that this transaction was such as the plaintiff had no right to enter into;" they have referred to Angel & Ames on Corporations, pages 84, 85, 232, 235; 2 Cowen, 678; 5 Conn., 560; 8 Ohio R., 286; 11 Ohio Reports, 48; 2 Kent's Com., 299, 300; that if the purchase of this certificate was not a transaction coming within the provisions of the charter of plaintiff as above stated, then it was the opinion of the court that the plaintiff had no power to purchase the paper, and the transaction was void for want of authority given by the charter to plaintiff, to become a party to and purchaser of this paper; that the only power the plaintiff had was given to it by its charter; that all its funds must be applied to the manufacture of iron, etc., and all its other business, and the employment of all its funds, must be subservient to it; and that if this was not so connected or subservient to it, then the plaintiff had no title to this certificate and could not recover.



\*3. That the defendant claimed "that the circumstances under which plaintiff took this paper were suspicious, and sufficient to put the secretary on inquiry as to the character of the paper before purchasing;" but that this was solely a question for the jury. If they were sufficient, then the plaintiff took the certificate subject to any defense which could be made to it in the hands of H. B. Castle, and in such case, if the certificate was issued by mistake, or without consideration, the plaintiff could not recover.

4. That the same would be the result if, by any arrangement, H. B. Castle had indemnified the plaintiff, or put it in funds to replace those paid out for the certificate in question.

5. That if a demand had been made of the amount due on this certificate, before it went into plaintiff's hands, it was to be treated as an overdue note, and subject to any defence that existed to it in the hands of the original holder.

Verdict for defendant.

For plaintiff, Spaulding & Paine.

For defendant, Bishop, Backus & Noble.

#### BOND—CONTRACT—AGENCY—BILLS OF REVIEW. 19

LEWIS CURTISS V. HUTCHINSON, BINGHAM & CO., AND BANK OF CLEVELAND.

[Bill of Review.]

1. A bond executed in Ohio, negotiable here, if to be performed in New York, and is there delivered, is a New York contract. And such bond not being negotiable there, will be so regarded in the courts of Ohio.
2. Such a bond is subject to the same defense in the hands of an assignee as it would be in the hands of the original holder.
3. The courts, in bills of review, are governed by rules similar to applications for a new trial, where there has been a verdict by jury.
4. Where a claim to recover a portion of the amount of such bond is set up by the assignee, because notes of the makers have been discounted on the credit of the bond, he must show he has a connection with the notes in some way, or produce them. It must appear they are not outstanding in the hands of another.
5. An agent exceeding his authority cannot bind his principal, when the person dealing with the agent knows he is exceeding the powers delegated to him.

This is a bill of review brought to reverse a decree of the supreme court, rendered in this county at the September term, 1845. The particulars will appear in the opinion of the court.

RANNEY, Supreme Judge, delivered the opinion of the court, as follows:

The original decree which this bill of review was brought to reverse, was rendered upon a bill to foreclose a mortgage executed by Hutchinson and Bingham to the Tenth Ward Bank, New York city, and the principal contest was between the plaintiff and the Bank of Cleveland, a subsequent mortgagee.

20 This being a bill of review, the case is situated \*differently from what it would be, if this court had to render the original decree. All that it is our duty to do, is to examine and see if there was evidence in the case to warrant the decree rendered, without coming to the conclusion whether we should have rendered the same decree or not. The rule is much the same in cases of review, as in granting new trials when there has been a verdict rendered by a jury.

The principal contest is *now* between the plaintiff and the representatives of the Bank of Cleveland.

We do not deem it necessary to notice all the points that have been raised and discussed, but only such as are deemed important to a correct decision.

It appears that in the spring of 1839, Hutchinson & Co., were engaged in milling, and had no means of prosecuting their business. The Bank of Cleveland had a mortgage of \$20,000 on their mill, and there were judgments against them for \$10,000 more. One of the firm, with one Schuyler, went to New York to raise money, but failed of obtaining any from any of the banks there. But an arrangement was made with the Tenth Ward Bank of New York, by which in a short time, a loan was to be made to them. This was to be done as soon as the bank should get to going and issue its bills.

The mill property being encumbered by the mortgage to the Bank of Cleveland and the \$10,000 in judgments, Hutchinson returned to Cleveland and procured a release from the Bank of Cleveland of its mortgage of \$20,000, and also obtained an advance from said bank of the further sum of \$10,000, to relieve the property from these judgments, so that it might be mortgaged to the Tenth

21 Ward Bank to raise the money to repay the advances of \*the Bank of Cleveland, as well as the amount of the mortgage of \$20,000.

On the 10th of April, 1839, Hutchinson & Co. executed a bond in the sum of \$35,000 to the Tenth Ward Bank, payable in New York, and also executed a mortgage to secure the same, on the property aforesaid.

Bingham went with this bond and mortgage to New York. But Mead, the president of the Tenth Ward Bank, said he could not then make the promised loan, but if they would take \$35,000 in stock, and deliver the bond and mortgage as security for the payment of it, the bank would, as a part of the arrangement, discount \$20,000 in the bills of the bank, and hold the stock as security for the loan. Bingham accepted this proposition, brought the stock home, and left it with the Bank of Cleveland as security for Hutchinson & Co.'s indebtedness to it.

May 15, 1839, the Bank of Cleveland, becoming alarmed as to its security, took another mortgage from Hutchinson & Co. to secure their indebtedness.

The Tenth Ward Bank, May 13, 1839, assigned the \$35,000 bond and mortgage to one Beers, who afterwards assigned it to the plaintiff; the consideration of the transfer to Beers was, as he claimed, some Alabama bonds furnished by him to the Tenth Ward Bank. The whole arrangement with Hutchinson & Co. by the Tenth Ward Bank, was to enable them to raise money to pay their debts, and that was known to Mead, the president, to be the only reason why Hutchinson & Co. made any arrangement with them.

Matters continued in this manner until September, 1839, when Hutchinson & Co. sent their notes for \$10,000 to Schuyler, to have the Tenth Ward Bank discount them, and also sent \$12,000 of the stock, as security. <sup>22</sup>

Mead, the president, would not discount the \$10,000, but said if Schuyler would take \$2,500 of the \$10,000 in stock of the bank, and become a director, he would furnish \$7,500, the balance of the \$10,000 in the notes of the bank, which were to be put into a miller's hands and go to Michigan—Schuyler claiming that he had made advances to Hutchinson & Co., and that the money was going to him. Schuyler handed the notes of Hutchinson & Co. to Mead, the president, took the \$2,500 in stock and the \$7,500 in notes of the Tenth Ward Bank, but instead of sending it to Michigan, it was put into a broker's hands in Wall street, and was sent to the bank for redemption; but the bank failed to redeem it, and was broken down by this presentation.

The Tenth Ward Bank never had any means of any real value, so far as appears by the testimony, except this Hutchinson & Co. bond and mortgage. Hutchinson & Co. never wished to become stockholders in the bank, except for the purpose of raising money as before mentioned, and this Mead well knew. At the time Hutch-

inson & Co. delivered the bond and mortgage, which was done in New York, Mead represented the bank in good condition—as having a large amount of stock subscribed by good and responsible men, and that it would shortly go into operation, and be in a most flourishing condition—all of which was utterly false, and the stock was never worth anything.

The question now is, *was the supreme court justified in coming to the conclusion it did?*

23 We have no hesitation in saying that the supreme \*court was clearly warranted from the evidence in the case, in dismissing the original bill. The whole scheme was a fraud on Hutchinson & Co. and the Bank of Cleveland, and an attempt by the managers of the Tenth Ward Bank to perpetrate a gross swindle upon Hutchinson & Co. At the time the Bank of Cleveland took its second mortgage, no advance had ever been made to Hutchinson & Co., and the stock was utterly valueless.

But it is claimed that Beers, before the Bank of Cleveland took the second mortgage, became a *bona fide* purchaser of this bond and mortgage to the Tenth Ward Bank, without notice of the fraud of the bank.

1. The bond and mortgage were, it is true, executed in Ohio, but the bond was to be performed in New York, and they were delivered there, and it must be regarded as a New York contract, and be governed by the laws of New York.

2. By the law of Ohio, such a bond would be negotiable, it being payable to assigns; but by the New York law it is not negotiable, and therefore it was transferred, and Beers and the present plaintiff took it, subject to the same defense which existed to it in the possession of the Tenth Ward Bank, and while it belonged to it. Therefore, as the Tenth Ward Bank must have failed, if it had brought the suit to foreclose the mortgage to it, so the present plaintiff must.

It is further claimed by the plaintiff that Hutchinson & Co. received \$7,500 by the discount of notes in September, 1839, and that to that amount, at least, the plaintiff should recover.

To this claim there are several objections: 1. The plaintiff  
24 does not produce the notes on which this money \*was advanced, nor show that he has any connection with them. For aught that appears, they may now be outstanding in the hands of some other person.

2. These notes were sent by Hutchinson & Co. to Schuyler,

in New York, as their agent, to be by him presented to the Tenth Ward Bank for discount, according to a previous arrangement. Schuyler had no authority from them to receive \$2,500 in stock and \$7,500 in money, as he did do, and this Mead, the president, well knew; and Hutchinson & Co. never ratified the transaction by receiving any of the money, or otherwise. This being the case, the transaction itself was void, and Hutchinson & Co. were never bound thereby. "An agent who exceeds his authority cannot bind his principal, where the person dealing with the agent knows he is going beyond the power delegated to him."—Story on Agency, section 165 to 174.

3. It could not be good in any event, as against the Bank of Cleveland, as it took and perfected its last mortgage in May, and this advance on the \$10,000 of notes was in September afterwards.

For these reasons, we have no hesitation in saying that the supreme court was justified in dismissing the original bill, and we therefore must dismiss this bill of review.

Foote, having been of counsel, did not sit in this case.

For plaintiff, H. Foote ; for defendant, F. T. Backus.

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## RESTORATION OF PROPERTY DEEDED BY PARENTS TO CHILDREN FOR SUPPORT.

BACON V. GIBBS.

[Chancery.]

1. Where B., a father, deeds his farm to a married daughter, taking back a life lease from the daughter alone, and an agreement for the support of himself and wife during life, and she commits them to the care of G., who abuses them, and she and her husband also deed G. the property, the court will restore the property to the father for life, and require G. to pay B. the difference between the living he did and should have furnished.
2. For the time B. was absent from G., he to be allowed such sum, for support, to be paid by G., as should be reasonable, and for the future to have the use of the farm and such other sum as might afford a reasonable support in addition—all of which to be a lien on the farm.

RANNEY, Supreme Judge, stated the case, and gave the opinion, as follows:

The complainant was an old man in 1836, and now very old; and in 1836 conveyed his farm to his daughter, Mrs. Sexton, and took back from her a life lease of the property, executed by herself alone, she being a married woman.

The husband of Mrs. Sexton wanted to go west, and so leased the property for five years, and then sold it, subject to the life

lease, to Gibbs, who by a suit in ejectment dispossessed the lessee. Gibbs then put his son in possession of the property, and undertook to support the complainant and his wife, who by the arrangement with Mrs. Sexton, were to have their living or be supported for life, as a consideration for the original conveyance and the use of the property.

It is perfectly clear that Gibbs, while he had the care of these old people, treated them as he should not; he treated them very badly till 1851, when they were obliged \*to leave Gibbs, and **26** seek shelter elsewhere, as their lives were rendered miserable with him. It is claimed Bacon and his wife conducted badly. If they did, it was no excuse for the conduct of Gibbs.

It is clear that the life lease to the complainant being signed by her alone, was a nullity, but she had no right to transfer the keeping of her parents to third hands, or place them in the care of strangers; it was a breach of the contract with the complainant in so doing.

In cases of this kind we must apply the rule applicable with much strictness.

The usual course in similar cases is to rescind the contract holding the parties to an account. If we should take that course in this case, Sexton's wife, after having sold the property and receiving pay for it, might again take the property as the heir-at-law of the complainant.

Instead of that, we will give to the complainant what we think he was substantially entitled to under the arrangement with his daughter, Mrs. Sexton:

1. Restoring the property to the complainant for life.
2. We shall decree that Gibbs shall pay to complainant the difference between the living he *did* furnish him and his wife, while they resided with young Gibbs, and the living he *should* have furnished, up to the time Bacon left.
3. Complainant shall be allowed for his annual support since he left Gibbs, such a reasonable amount as it was right and proper for him to have, under all the circumstances of the case.
4. The complainant having the land restored to him for life, we order that a master shall ascertain what is a reasonable sum for the complainant's annual support hereafter, \*and we order that **27** from that sum the annual value of the land shall be deducted, and the balance be paid in specified installments.
5. We order that all these several sums be a lien on the prop-

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erty in question, and that on a failure to pay them according to the decree to be entered in this case, then that the premises be sold to pay the same.

H. D. Clark, for plaintiff.

Bissell & Myers, for defendants.

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### PRIORITY OF MORTGAGE LIEN.

BREWSTER V. CLOUGH ET AL.

[In Chancery—Reserved from Summit County.]

1. A mortgage delivered for record has priority over a claim by W. under an *agreement* for a mortgage, although the mortgagee knew of W's claim when he received his mortgage.
2. Although W's claim for a mortgage cannot prevail against the recorded mortgage, yet W's demand being for the purchase money of the land mortgaged, which was known to the mortgagee when he took his mortgage, the mortgage will be postponed to W's right under his vendor's lien, although the title which W. held to the land and sold was only an equitable one.

The case was in substance this: Brewster agreed with Whittlesey to examine his farm for coal, and if coal was found, Whittlesey was to open the pits, and to have one-half of the proceeds of the coal taken out, and a deed of one-half the farm. Whittlesey proceeded to perform his contract, but before completing it, he sold his interest in the agreement with Brewster to Clough, who was to pay Whittlesey \$3,000 in different payments, and was also to fulfill Whittlesey's agreement with Brewster, and was to take a deed from Brewster and mortgage the property to Whittlesey to secure any balance due him. Brewster advanced to Clough \$400 to pay to Whittlesey on his agreement, and \$200 to open the pits. Brewster, well knowing the agreement between Whittlesey and Clough, gave Clough a deed and took a mortgage to himself to secure the \$600 advanced. Whittlesey afterwards ascertaining this, claimed that Brewster's mortgage was fraudulent as to him, but he took a mortgage from Clough, not waiving his right to have the amount due from Clough to him first satisfied.

RANNEY, Supreme Judge, delivered the opinion, holding:

1. That as Brewster's claim was an honest demand, and his mortgage was recorded before Whittlesey's, it must prevail over Whittlesey's; that the knowledge of Brewster of Whittlesey's right to a mortgage from Clough, made no difference, the statute giving the priority to the mortgage first delivered for record.

2. The court further held, that although the mortgage of Brewster must have priority over Whittlesey's, yet Whittlesey had a vendor's lien upon the land for his purchase money, unless he was prevented from asserting this lien, because his interest in the land sold to Clough was only an equitable one.

3. That the court could not see why an equitable interest in land amounting to the whole value of the land, should not entitle the vendor to his vendor's lien, the same as though he had sold the equitable coupled with the legal title.

Decree enforcing Whittlesey's vendor's lien, as having a priority over Brewster's mortgage.

**\*MARRIAGE.**

†ELIZA DUNCAN V. JAMES DUNCAN AND OTHERS.

[PETITION FOR DOWER.]

1. To constitute a valid marriage at common law, all that is required is persons competent to contract and an agreement to take effect immediately which need not be followed by cohabitation, or an agreement to take effect in future, followed by cohabitation.
2. It is not necessary to the validity of such marriage that it be solemnized by an officer or clergyman, etc.
3. This rule prevails in Ohio and the United States generally. In England it is altered by act of Parliament.

The husband of the plaintiff having deceased, she filed her petition for dower, which was opposed by James Duncan defendant, because, as he claimed—1st, the plaintiff was never married to the deceased; 2d, the deceased had another wife living at the time plaintiff claimed to have been married to the deceased.

It appeared in evidence that no marriage had ever in fact been solemnized between the plaintiff and Alexander Duncan, the deceased, but from 1847 to the time of his death, Duncan acknowledged the plaintiff as his wife—she acknowledged him as her husband—they passed as husband and wife, cohabited together, and had children. It also appeared in evidence that Alexander Duncan had a former wife living in Ireland, but it also appeared that she had deceased some six months previous to the death of Duncan. There was testimony to show that after the death of the former wife, the petitioner reminded the deceased of his promise

† This case was reversed by the Supreme Court with full report, 10 O. S., 181.



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to marry her, and he then renewed it, and finally died without any ceremony being actually performed. The petitioner and deceased having lived together as husband and wife from the time of making this \*last engagement till Alexander Duncan died, it was claimed by the petitioner's counsel, Messrs. J. Adams and Wm. Abbey,<sup>30</sup> that the evidence in the case showed a valid marriage of the petitioner and the deceased, at common law, and that a solemnization of the marriage was not necessary to render it legal, and that the law of Ohio regulating marriages was merely directory, and did not render a common law marriage void. They referred to 2d vol. Greenleaf's Ev., sec. 460; 2 Salk, 437; 1 Hill, 270; 3 Marshall, Ky. R., 1198; 8 Paige, 574; 9 do, 611; 2 Kent's Com., 86-91; 2 N. H. Rep., 268; 1 Gray, 119.

S. I. Noble and Axtell & Prentiss, for defendants, claimed that the common law marriage without a solemnization, is contrary to the spirit of the legislation of this state, and therefore invalid.

The Court, per RANNEY, Supreme Judge, delivered the opinion, as follows:

We are satisfied that the deceased had a former wife in Ireland, but the proof is just as clear that she was dead at least six months before the decease of Duncan. It is clear that after the former wife's death the petitioner called on the deceased to fulfill his promise to marry her, and he then agreed to do so, but died without having any marriage ceremony performed. They, however, lived together as if married, and passed as husband and wife, and acknowledged themselves as such up to Duncan's death. Was this a valid marriage by the common law, and also by the laws of Ohio? for it is to be governed by the law of Ohio, if *it* presents a different rule from the common law.

A general summary of the law upon this subject, is \*found in Greenleaf on Evidence, vol. 2, section 460, which is as follows:<sup>31</sup>

"Marriage is civil contract *jure gentium*, to the validity of which the parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti*; tho' it is not consummated by cohabitation; or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in absence of all civil regulations to the contrary. And though in most if not all the United States there are statutes regulating the celebration of the marriage rites, and inflicting a penalty on all who disobey the regulations, yet it is generally considered

that in the absence of any positive statute, declaring that all marriages not celebrated in the prescribed manner, shall be absolutely void; or that none but certain magistrates or ministers shall solemnize a marriage—any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.”

According to this rule, in order to constitute a valid marriage, all that is necessary by the common law, is, parties competent to contract, and an agreement to take effect immediately, whether followed by consummation or not, or in the future followed by subsequent cohabitation. In this case we find abundant evidence *per verba de futuro*, and subsequent cohabitation continuing up to the time of Duncan's death, from which to find a valid marriage. By the common law then the petitioner was the wife of Alexander Duncan.

32 Does the law of Ohio alter this? It is contended that \*it does, and that such a marriage is contrary to the spirit and policy of our legislation.

By a comparison of the laws of Ohio with the laws of other states on this subject, it will be found that our laws are not materially variant from the laws of other states, and it is believed that in nearly if not all the United States, a marriage valid at common law is legal; and the prohibitions and penalties apply only to the officers who issue marriage licenses or solemnize marriages, leaving the marriage itself valid and binding. We see no reason for the establishment of a different rule in Ohio.

In England, by act of Parliament, a marriage by the common law is declared void, unless solemnized by some officer or clergyman prescribed by law; but in the United States a different policy prevails.

This conclusion has been arrived at in part in view of the serious consequences that a contrary holding would produce.

The courts have gone this length rather than render criminal the intercourse following these common law marriages, and render illegitimate the issue of such marriages. To do the latter would be to punish the innocent for the sins of others.

In view of all the facts of this case, we are brought to the conclusion that the petitioner was the lawful wife of Alexander Duncan, and entitled to dower in the lands of which he died seized. We decree accordingly.

**\*PROMISSORY NOTES—JUDGMENT.****33****SIMMONS AND OTHERS V. WILLIAM P. BROWN.****[IN ERROR.]**

1. A note in which the payee's name is blank, is payable to bearer.
2. It is not ground for error, that a petition is not sworn to; that must be taken advantage of on motion before judgment.
3. A power of attorney to confess judgment on such note in favor of the holder thereof, is available to the person who may be the holder of the note at the time judgment is rendered, although not the original holder, or payee.
4. If the record shows a judgment confessed and execution awarded, it is sufficient, although there is no technical finding and rendition of judgment.
5. The requirements of law as to making up and signing the records of the common pleas are only directory, and the proceedings are valid without such making up and signing.

In the court of common pleas, defendant in error obtained a judgment on a cognovit attached to a note payable to the order of ———; the name of the payee being left blank. The note was for \$2,000 at 90 days; the cognovit authorized a judgment to be confessed in favor of the holder of the note, and errors to be released.

The petition averred that Wm. P. Brown was the holder of the note; that there was due to him on said note \$2,000 with interest, etc., (not describing the note, but only referring to a copy attached to the petition). Petition was not verified.

The attorney who confessed the judgment in his answer did not admit any amount due, but merely confessed a judgment "for \$2,000, and interest from the time said promissory note, in said petition mentioned, became due," releasing errors, etc. In rendering judgment, the court did not find any amount due, but says, "Said attorney, for defendant, confesses a judgment in favor of plaintiff \*for \$2,391<sup>33</sup>/<sub>100</sub>; and the court award execution to collect the same," etc. 34

Plaintiffs in error claimed the judgment should be reversed, and made 11 assignments of error, among which they claimed a reversal, because there was no payee in the note; because petition was not sworn to; because judgment was rendered without the court having any legal evidence of the claim of plaintiff; because the record of the case in common pleas was not made up by the clerk and subscribed by the presiding judge, as required by law; because no judgment was in fact rendered by the court below, but only execution awarded.

FITCH, Judge, delivering the opinion of the court, held—There was no error apparent in the record; that the petition sufficiently alleged the plaintiff's right in the common pleas to recover the amount due on the note as the holder.

That there being no payee in the note, it must be held as payable to bearer, the same as a note made to a fictitious payee, which has always been held as payable to bearer.

That it is no error that a petition is not sworn to; that is a defect to be taken advantage of before judgment, on motion.

That as to the point "that the record shows no legal evidence before the court of common pleas to authorize the judgment," this court will presume that the proper proof was before it to authorize its finding and judgment.

That the requisitions as to making up the records of the common pleas and the signing thereof is directory, and a failure to do so cannot prejudice any person who has acquired rights by virtue of the judgment.

<sup>35</sup> \*That although there is no technical finding and rendering of judgment by the court of common pleas, yet what is apparent from the record is equivalent thereto, and is substantially a good judgment.

Judgment of the common pleas affirmed.

For plaintiff in error, Floyd & Bostwick.

For defendant in error, Williamson & Riddle.

## INTOXICATING LIQUORS.

POLLARD V. STATE OF OHIO.

[IN ERROR.]

A sale of intoxicating drinks to a minor under twelve years of age, as agent of S., is a sale to S., and need not be upon the written order of the parent, etc., of the minor, to render such sale lawful.

Defendant was convicted in the probate court for a violation of the 2d section of the law against sale of intoxicating drinks, which provides against sale to minors, "*unless upon a written order of their parents, guardian or family physician.*"

The sale in this case by defendant was of a pint of whisky to a minor 12 years of age, as the agent of one Smith, and this agency was made known at the time the sale was made.

FITCH, Judge, delivering the opinion, held—That as there might be a sale by an agent, so there might be a sale to a person

## Leffingwell v. Castle.

by his agent; that this sale, although to a minor, was only made to him as agent of Smith, and therefore a sale to Smith, and not within the provisions of said 2d section.

Judgment of probate court reversed.

Williamson & Riddle for the state.

Lynde & Castle for Pollard.

## \*APPEALS.

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## LEFFINGWELL V. CASTLE.

1. Immediately on appeal from the common pleas to the district court, the penalty allowed by the law attaches, and it cannot be avoided by tendering the amount of the debt and costs before judgment in the district court.
2. In cases where there is an absence of defense and an appeal for delay, the penalty will be only five per cent. unless it appears that the appeal was also for the purpose of vexing and harrassing the plaintiff.

Previous to the sitting of this court, defendant offered to pay the amount due on the mortgage and all the costs, but would not pay any penalty. Plaintiff refused to receive the money and discharge the claim unless the penalty was also paid; and the question submitted was, at what time the penalty attached, and whether it should be 5 or 10 per cent.

FOOTE, J., delivered the opinion, holding—

1. That the right to the penalty attached in cases where parties were entitled to it when the appeal was perfected; and that the defendant could not, by tendering or paying the amount of debt and costs, avoid the penalty. If that could be done, then a party could obtain the delay consequent on appeal, and avoid the penalty allowed by law altogether.

2. That unless something more appeared in the case than a mere default or absence of any defense on the part of the defendant, no more than 5 per cent. penalty would be allowed.

3. To entitle the appellee to 10 per cent. penalty there must be not only an absence of all defense, but proof that the appeal was taken not to obtain further time merely, \*but that the delay was for the purpose of vexing and harrassing the appellee. 37

Judgment accordingly.

For plaintiff, Bishop, Backus & Noble.

For defendant, Bolton, Kelly & Griswold.

**COMMERCIAL LAW.****THOMAS & GREINER ET AL. V. FOREST CITY BANK.**

[IN ERROR.]

In a suit on a protested foreign bill of exchange, for damages as well as principal, the bill being addressed to D & Co., Phila., Pa., it will be presumed that the drawees resided there, and the court will take judicial notice that such place is out of the state of Ohio.

The defendant in error recovered a judgment by default in the common pleas for \$1,086.50, being principal and interest and six per cent. damages on a protested draft drawn and endorsed by plaintiff in error, and directed to "Messrs. Drexell & Co., Philadelphia, Pa."

Plaintiffs in error claimed that it did not appear sufficiently from the record that the drawees resided in Philadelphia, Pa., and that they did not reside in Ohio. The only evidence of the drawees' residence was the address to them in the draft, as above described. It was also claimed by plaintiff in error, that the court could not take judicial notice that the Pennsylvania named in the address, was not in this state.

STARKWEATHER, Judge, in delivering the opinion of the court, held—

1. The draft being addressed to persons in Philadelphia, Pa., it would be presumed they resided there.

2. That the court may take judicial notice of the division \*of  
38 the country into states, counties, etc., and of the names by which they are designated, and of the relative position which they bear to each other—and that the court did not err in taking judicial notice that Pennsylvania was out of the state of Ohio, therefore judgment is affirmed, with costs.

H. Griswold, for plaintiff in error.

Mason & Estep, for defendant in error.

**CONFESSION OF JUDGMENT.****LEISH V. CROMWELL AND OTHERS.**

[ERROR.]

A judgment confessed by virtue of a warrant of attorney authorizing judgment to be confessed in favor of the *holder* of the note, and "against —," is not erroneous because the plaintiff is not the payee, or the name of the person is blank against whom judgment may be confessed.

## Sturges &amp; Hale v. Williams

The record in this case showed that a judgment was taken in the common pleas, by warrant of attorney attached to a promissory note, and payable to Wm. Slade, Jr., attorney for the above defendants, and the power of attorney authorized the judgment to be confessed in favor of the holder of the note and "against ———," the names being left blank as to the persons against whom the judgment was to be confessed. Slade, before judgment, endorsed the note to the above named defendants.

The principal error assigned was, that the warrant of attorney did not authorize the judgment contained in the record.

The court, by RANNEY, Supreme Judge, held—

1. That the warrant of attorney authorized a judgment in favor of the holder of the note; that the judgment was properly confessed in favor of Cromwell and others,\*they being the owners and holders of the note; that the power of attorney in 19 Ohio R., 130, <sup>39</sup> Osburn v. Hawley, did not authorize a judgment in favor of the holder, and in that it is distinguishable from this case.

2. That, as the warrant authorized judgment for the amount due on the note, if the word "against" was dropped, the meaning would appear clear that it was the design of the signers of the power of attorney, to authorize a confession of judgment against the makers of the said note.

Judgment of the court of common pleas affirmed.

Bolton, Kelly & Griswold, for plaintiff in error.

Wm. Slade, Jr., for defendants in error.

**PROMISSORY NOTES.**

† STURGES & HALE V. E. G. WILLIAMS.

[ERROR.]

A promissory note drawn by R., payable generally to W.'s order, and by W. endorsed for R.'s accommodation, no blank being left for inserting a place of payment, may be avoided by W., if R. before he parts with the note inserts in it a place of payment with the knowledge of the endorsee, and without the knowledge or consent of W.

The facts of this case are as follows:

E. Rawson, for his own accommodation, drew a note, of which the following is a copy:

"\$500. CLEVELAND, March 7, 1853.

"Two months after this date, I promise to pay to E. G. Williams, Esq., or order, five hundred dollars, value received.

"(Signed)

EDWARD RAWSON.

"(Endorsed) E. G. Williams."

† The judgment of the District Court in this case was affirmed by the Supreme Court, 9 O. S., 443.

40 \*This note was taken by Rawson to the plaintiffs to be by them discounted for his (Rawson's) benefit. The note, before it was discounted, was altered by E. Rawson in the plaintiffs' banking room, (as was admitted,) with their knowledge, by inserting in the body of the note, between the words "order" and "five," the following: "Payable at the office of Sturges & Hale." So that the note was changed from one payable generally, to one payable at the office of the plaintiffs, in the city of Cleveland.

The court below charged the jury "that the writing of the words 'payable at the office of Sturges & Hale,' on said note, by said Rawson, as above stated, was a material alteration of the note, and if made without the knowledge or consent of Williams, he was thereby discharged from the payment of the note."

Griswold & Loomis, attorneys for plaintiffs:

Claimed that the note was made for E. Rawson's accommodation; and although endorsed by Williams, it was not a valid obligation, until it was negotiated for value to the plaintiffs; and that until it was negotiated, Rawson being the principal, was like the acceptor of a bill of exchange, who had a right to designate where the money should be made payable; and they referred to 18 Johnson's Reports, 315, Bank of America v. Woodworth. They also referred to the opinion of Chancellor Kent in the case of Woodworth v. Bank of America, 19 Johnson's Reports, 393, and contended that it contained the law, although a majority of the court of errors held otherwise.

Backus & Noble, attorneys for defendants:

41 Claimed that the ruling of the court of common pleas \*was right; that the alteration of the note by Rawson, after it had been endorsed by Williams, without Williams' knowledge and consent, was a material alteration of the note, and discharged Williams, especially as it was done with the knowledge of the plaintiffs. They referred to Woodworth v. Bank of America, 19 Johnson's R., p. 418; opinion of Skinner, Senator; also Smith's Leading Cases, 714 and 715, and 24 Wendell, 347, Napo & Green v. Fuller & Patterson.

The court, per RANNEY, Supreme Judge, delivered the opinion as follows:

The note in question was not legally in existence till it was discounted by Sturges and Hale. Then as Williams endorsed the note and it was payable to his order, it must be presumed that he was a mere surety, and entitled to all the privileges of one. If he had endorsed the note, and it had been payable to Sturges and Hale,



he would have been deemed an original maker, and *prima facie* might have been treated as such.

This alteration was without the knowledge of Williams and if enforced at all, must be enforced in its present form.

When Williams endorsed the note and delivered it to Rawson, there being no blank left in it to be filled up in order to make it complete, he had a right to presume that Rawson would use the note as he had received it from Williams when he endorsed it. It would have been otherwise if a blank had been left to be filled up by Rawson.

The supreme court, in case of *Selser v. Brock*, 3 Ohio State R. p. 302-308, decided at the December term, 1854, "That when one of two innocent persons must suffer by the fraud of a third person, he who trusted the third person and put into his hands the means to commit the wrong, must bear the loss." 42

Now, when Williams endorsed this note and placed it in the hands of Rawson, he put it in the power of Rawson to alter the note, any time before it was delivered by Rawson, and before it took effect as a note. And if Rawson had altered it at any time before delivering it to Sturges and Hale, without their knowledge, and they had purchased it *bona fide*, then according to the principle decided in the above case of *Selser v. Brock*, Williams ought to be bound by it, as by entrusting it to Rawson to be negotiated, he placed it in the power of Rawson to change the place of payment, or to make other alteration in the note, whereby a third person and innocent holder of the note might be deceived.

This case, however, is different. Sturges and Hale had knowledge how Williams intended to have the note payable, and they knew he was not present to consent to the alteration, and they could not therefore claim as innocent *bona fide* purchasers of the note in its altered form. And we are now brought to this point—"Was this alteration *material*?" If not, then the judgment of the court of common pleas was erroneous, and should be reversed. If it was material, then the judgment must stand.

A party has a right to say what kind of a contract he will enter into, and when entered into, it cannot be changed without his consent, even so as to make it beneficial to the party entering into it without rendering it void as to all who know of such change.

The undertaking of Williams was, that on condition that the holder of this note would demand payment of it of Rawson personally, or at his residence, when it should become due, then in 43

case the note should not be paid, if he, (Williams,) was notified thereof, he would pay the note. In the altered form of the note, the condition was, that provided Rawson had no funds at the office of Sturges & Hale to meet the note when due, or if payment was demanded there and not made, and he was duly notified thereof, then he would pay the note. In the latter case something different is contemplated to be done from what was contemplated in the former, and the condition is a different one. If an alteration can be made so as to change the place of payment, then it might be so altered as to be made payable in New York, where the rate of interest is seven per cent. instead of six; and then, would such an alteration not only change the place of payment, but would also increase the amount in case the note was on interest. We must conclude then, that the alteration was material, and being done with the knowledge of the plaintiffs in error, it avoids the note. If they had purchased it having no knowledge that the alteration was without Williams' consent, and before it had ever taken effect as a note, then our conclusion would have been otherwise.

In the case of *Bank of America v. Woodworth*, 18 Johnson's R. 315, which was a case where the place of payment was altered by the maker before delivery to the endorser, before it was discounted, and without the knowledge of the endorsee or endorser, where the supreme court of New York held that the endorser was not discharged thereby, and which judgment was reversed by the court of errors, 19 Johnson's R., 191, we regard the decision of <sup>\*</sup>the supreme court as the better law, and should so hold if that <sup>44</sup> case was presented to us. The case now before us is materially different from that, and we must affirm the judgment of the court of common pleas.

**\*CIRCUIT COURT, N. D. O.**

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**JULY TERM, 1856.**

[Before Hon. John M'Lean, of the Supreme Court, and Hon. H. V. Willson,  
of the District Court.]

**STREET ASSESSMENTS.****SAMUEL W. STIMSON V. J. W. SCOTT.**

[IN CHANCERY.]

The city of Toledo, under the Municipal Corporation Law of 1852, passed ordinances for the improvement of a part of Summit street, and assessed the expense at a fixed sum per foot front on the land abutting on the improvement, and authorized plaintiff to collect the assessments in his own name, he having done the work in making the improvement.  
*Held—*

1. The plaintiff had a right in his own name to collect the assessments; and that this court has jurisdiction of this case, the plaintiff not being a citizen of Ohio and taking by operation of law, and not by assignment under the 11th section of the U. S. Judiciary Act of 1789.
2. Such assessments are not unconstitutional under the new Constitution of Ohio.

Opinion of JUDGE MCLEAN.

This suit is brought to enforce the collection of a special assessment, levied by ordinance of the city council of the city of Toledo, for the grading and improving of Summit street, in said city, under the municipal corporation law of Ohio, passed 1852. The city council \*passed an ordinance for the improvement of a portion of Summit street, and assessed the expenses of the improvement<sup>46</sup> on the land fronting or abutting on said improvement, at a certain amount per foot front on the street, and then contracted with the plaintiff to do the work necessary to complete the improvement. This work was done and accepted by the city. Another ordinance was also passed, whereby the special assessments for this improvement were to be paid to the plaintiff, and he was authorized by said ordinance to proceed and collect them in his own name. Among these assessments was one against the defendant.

The defendant demurs to the complainant's bill, and makes several points which will be noticed in this opinion.

1. *It is claimed, generally, that this court has not jurisdiction of this case.*

On the record, there is no doubt but the proper parties are before the court, the complainant being a citizen of New York, and the defendant a citizen of Ohio. But it is claimed that this court cannot take jurisdiction of the case, because the plaintiff is the assignee of the claim on which he sues, and therefore comes within the 11th section of the judiciary act of the United States, of 1789, which is as follows:

"Nor shall any district or circuit court have cognizance to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

47 The plaintiff is not an assignee within the meaning of this statute. He does not take as assignee of the claim \*on which he sues, but by operation of law, and the proceedings and ordinances of the city council of the city of Toledo; and it makes no difference that the city of Toledo had also a right to proceed and collect this assessment in its own name, so long as it did not exercise that right.

It is well settled, where a person, a resident of one state, has acquired a right under the statute of another state, he may resort to the federal court to enforce that right.

So a person having a lien, by a state law, upon a vessel, may go into admiralty court to enforce the lien.

The case of Deshler v. Dodge in the supreme court of the United States, 16 Howard's R., 622, is a much stronger case than this against the jurisdiction of the court. That was a case where Dodge, as treasurer of Cuyahoga county, Ohio, distrained for taxes \$38,592, of bank bills belonging to certain banks in Cleveland, in said county, which taxes the banks claimed were unconstitutionally assessed against them, and they sold the bills in the hands of Dodge to Deshler, of New York, who brought a suit in replevin for them in this court, and took the money out of the hands of Dodge, yet the court held the United States circuit court had jurisdiction of the case.

2. It is objected that the tax is unconstitutional by the new constitution of Ohio, as the tax is not assessed according to article 12, section 2, of this new constitution.

This article refers to general taxation for revenue purposes, and has no reference to special assessments for local improvements.

But we can see no objection to this assessment from inequality.

It is levied by a "uniform rule" on a particular district, that is, at a certain amount per foot front. \*This is the general rule everywhere, and it is right. No more equal mode could be fixed upon. 48

It is said that this assessment should extend to the whole street, and not a portion of it, as in this case. From aught that appears, the assessment does extend over all that part of the street not before improved.

We see no objection to maintain this suit, on any of the points raised.

Demurrer overruled. Decree for complainant.

For complainant, Bassett & Kent.

For defendant, M. R. Waite.

## 51 \*DISTRICT COURT, CUYAHOGA COUNTY.

OCTOBER TERM, 1855.

REPORTS OF CASES DECIDED IN THIS COURT, BY JUDGE RANNEY, OF THE SUPREME COURT, AND STARKWEATHER, FOOTE, FITCH AND OTIS, JUDGES OF THE COMMON PLEAS. THE REPORTS WERE SUBMITTED TO AND APPROVED BY THE JUDGES RESPECTIVELY WHO DELIVERED THE OPINIONS.

## FORECLOSURE OF MORTGAGE—REDEMPTION.

E. J. ESTEP V. E. ADAMS ET AL.

[IN CHANCERY.]

A. purchased land of S., in 1835, in Cuyahoga county, Ohio, and mortgaged it back for the purchase money. After the mortgage money became due, and while A. was in possession, D. recovered a judgment in the common pleas in said county v. A. A. afterwards surrendered possession to the mortgagee, who commenced a foreclosure of his mortgage. At the same term the bill to foreclose was filed and the suit pending in said court, a second judgment was recovered against A. in the same court, but recovered on a day subsequent to the commencement of foreclosure. Neither of these judgment creditors was made a party to the proceedings to foreclose. The mortgaged premises having been sold under these proceedings, and the judgments assigned to Estep, he claimed a right to redeem said premises by paying the amount of the mortgage. *Held—*

1. Plaintiff had a right to redeem as to the first judgment.
2. That the second judgment having been obtained *pendente lite*, it was not necessary to make the judgment creditor party to the foreclosure.
3. *Whether* a judgment is a lien on mortgaged premises, the mortgagor being out of possession and the condition forfeited. *Query?*
4. When such right to redeem exists, no period short of twenty-one years will bar it.

This case shows that the defendant, Adams, purchased land of Swan, in Brooklyn, in Cuyahoga county, 1835, mortgaged the same to said Swan at the same time to secure a part of the purchase money, that after the mortgage money became due, but while the mortgagor was in possession, and at the October (1837) term of Cuyahoga common pleas, I. P. Dorman recovered a judgment against Adams; Hepburn & Shepard, at the November term of the same court, (1839,) recovered another judgment; but at the latter

time Adams was not in possession, but had surrendered possession to the mortgagee; both of which judgments were kept alive by issuing executions. The second judgment was recovered at the same term at which the proceedings were commenced to foreclose a mortgage, but a day subsequent to such commencement. At the November term (1839) suit was commenced to foreclose the mortgage, without making the said judgment creditors parties. A sale was made of the mortgaged premises under the foreclosure proceedings aforesaid, and the premises were sold to said Swan as upon executions upon judgments at law.

Estep, as assignee of the judgments, claims the right to redeem said mortgaged premises, by paying the amount of said mortgage.

The court, per FOOTE, Judge, held, that Adams, the mortgagor, being in possession of the premises at the time the judgment was recovered by Dorman, although the condition of the mortgage was forfeited before that time, yet the judgment was a lien upon the mortgaged premises subject to the mortgage of Swan; that the courts of this state had repeatedly held, that in cases like this the judgment is a lien on the mortgaged premises remaining in possession of the mortgagor at the time of the recovery of the judgment.

That, as to the judgment recovered by Hepburn & Shepard, it was situated differently. When that was \*recovered, or actually rendered, suit had been commenced to foreclose the mortgage; that it was a settled principle in equity proceedings, that persons acquiring an interest by their own acts in the subject matter of a suit *pendente lite* were not entitled to be made parties; that for that reason the suit to foreclose might properly proceed without any notice being taken of the Hepburn & Shepard judgment, or making the plaintiffs in that judgment parties.

Whether a judgment is a lien upon mortgaged premises, the condition being forfeited and the mortgagor out of possession at the time of a judgment being rendered against him, the court declined to express an opinion.

That if the plaintiff had a right in other respects, he would not be deprived of his right to redeem, because his equity had become stale. Sleeping upon his rights for thirteen years, if his judgments had been kept alive during that time, would not prevent his coming into this court for relief. No period short of twenty-one years would bar him of that right.

Therefore, as to the Dorman judgment, the plaintiff had a

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District Court, Cuyahoga County.

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right to redeem, and as to the Hepburn & Shepard judgment, no right of redemption existed. Decree accordingly.

Estep, for plaintiff.

Williamson & Riddle for defendants.

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**\*PLEADING AND PRACTICE.****WILLIAM SLADE, JR., v. DOOLITTLE & NORTH.****[MOTION TO STRIKE OFF ANSWER.]**

1. A counterclaim or set-off will not be struck off on motion, although defectively stated, if the same is capable of being so stated as to constitute a defense.
2. The court will be liberal in allowing amendments, to promote substantial justice.
3. When land is sold as a part of a subdivision, in which is a public square, the vendors cannot vacate the square, without making good to the vendees any injury sustained thereby; and such injury may be set up under the code, to reduce the amount sought to be recovered by the vendors or their assignees.

The plaintiff claimed in this case, that he was the vendor's assignee of contracts for the sale by Pelton, etc., to Doolittle, of certain sublots on University Heights, in Brooklyn, in this county. A plat had been made of the property subdivided, and as a portion of the plat, a public park, containing five acres of land, was laid out; and the property purchased by Doolittle was near this park. It was also a matter of public notoriety, that an university was to be established and kept up on this subdivision, and a portion of the subdivision was set apart for university grounds, and a building was erected, and a school established; but it was discontinued, and still remains so. The contract does not stipulate for the establishment of the school, or continuance of it. After the execution of these contracts, the proprietors of the subdivision vacated so much of the same as applied to the park, and sold the park out to another person.

Doolittle sold some or all of his interest as purchaser, to North.

The defendants set up the above facts as a defense, by counterclaim to the claim of plaintiff, to lessen the amount \*he was entitled to recover on the contracts. 1st, they claim that the university is not kept up, and there is no prospect of its being kept up; 2d, that the lots sold as aforesaid are worth less by \$900, on account of vacating the plat.



The plaintiff moved to strike out both of these claims interposed by the defendants, because they constituted no defense to the claim of plaintiff, if proved.

The court, per RANNEY, Supreme Judge, held—

That a motion to strike out a counterclaim or set-off will not be entertained, when it appears merely that the defense is defectively stated. If it appears from the statement that the matters defectively set forth may be stated in any form, so as to avail the party as a defense in whole or in part, the remedy of the party objecting is to have the statement rendered more certain, by way of amendment, and the court will be liberal in the allowance of amendments in such case, on motion of either party, in order to have substantial justice done.

But if it not only appears from the answer put in, that the matters set up as a defense, though defectively stated, cannot in the present form, or by way of amendment be made available as a defense, then so far as the answer sets up such inadmissible matter, it will be struck out on motion.

Try the motion by this rule, and the court comes to this result—that so far as the neglect to establish and keep up an university is concerned, the defense insisted on in the answer must be struck out, as asked in the motion; that as to so much of the defense as relates to vacating the plat, that will not be struck out, but the motion must be denied.

\*That so far as the keeping up of the university is concerned, it nowhere appears that it was to be kept up by the vendors, or that <sup>56</sup> they were in any way to be responsible therefor; that so far as vacating the plat is concerned, that stands on a different principle. It was a portion of the subdivision of which the land purchased by Doolittle was part; and though not acknowledged and recorded so as to be a dedication to the public, yet it was a portion of the subdivision into which Doolittle purchased, and the proprietors having sold lots according to this plat, equity will require them to do justice.

If under the former practice, a bill for specific performance had been filed, this defense might be interposed; and the code permits any defense that might be made in a proceeding for specific performance by vendors.

Equity might interfere, and prevent any material alteration of the plat or subdivision, so as to interfere with the value of the lots sold; and if there is a material alteration of the subdivision whereby the defendant's lots are lessened in value, then the purchaser has a

right to have the amount of the diminished value deducted from the purchase price; that the vendor has no right to lessen the value of the land sold by him, by vacating streets or public grounds, with reference to which a party purchases, without being responsible to the purchaser in damages.

For plaintiff, Wm. Slade, Jr., and Griswold & Loomis.

For defendants, Wyman & Thayer and Bishop, Backus & Noble.

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**\*DESCRIPTION OF LAND IN DEED.****HUBBARD V. CARMAN.**

[ERROR.]

Lot No. 71, "according to Baldwin's Survey," contained 156 83-100 acres. By actual survey it contained 162 19-100 acres. By a purchase of 50 acres off the south part of Lot 71 "according to Baldwin's Survey," the purchaser is entitled but to 50 common acres and has no interest in the surplus.

This case was substantially as follows:

James Hubbard, in March, 1854, purchased of Wm. Watson certain land by deed. The land was described as follows: "The south part of lot 71, according to Baldwin's survey, to-wit: 50 acres taken from the south side of lot No. 71, in Strongsville, the north line of said 50 acres to run across the lot, parallel with the line." It appeared in evidence that by Baldwin's survey this lot contained 156 83-100 acres, and that by a recent survey it was found to contain 162 19-100 acres. It was agreed at the time Hubbard took the deed, if the land deeded contained more than 50 acres, the purchaser was to pay at the rate of \$28 per acre for such excess. It was claimed by the grantor, that the words "Baldwin's survey," qualified the contract, so that instead of taking just 50 common acres, the grantee, Hubbard, took by his deed 50 common acres and such portion of the excess aforesaid as 50 bears to 156 83-100. The parties had previously adjusted the matter between themselves upon that basis, and a note was given by Hubbard to Watson for \$44.29 to cover this excess, which note was transferred after due to Carman, who recovered a judgment in the common pleas for the amount of the note. The defense was that there was no more than 50 acres, and the note was without consideration.

\*The court, per STARKWEATHER, Judge, held—

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1st. That the words "Baldwin's survey," only applied to the description of the lot 71, a part of which was sold to Hubbard, and that it could not have the effect of qualifying the word acre as commonly understood, so as to make it contain a larger quantity than it otherwise would.

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M. A. Eldridge v. J. M. Woolsey.

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2d. That, although there was a greater number of acres in "lot 71, according to Baldwin's survey," than the original survey called for, yet the deed to Hubbard calling for only 50 acres to be taken off from the south side of the lot, he could take only 50 common acres, and had therefore no interest in the surplus. Such being the case, the note was without consideration, and the judgment of the common pleas must therefore be reversed.

H. D. Clark, for plaintiff in error.

C. Stetson, for defendant in error.

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### JUDGMENT ON REPORT OF REFEREE.

M. A. ELDRIDGE V. J. M. WOOLSEY.

[ERROR.]

In the suit, before the code, of W. v. E., a reference was made in the common pleas, and the referee was ordered to take, and state an account between the parties. E. did not assent to the reference. The referee reported an indebtedness of over \$10,000 from E. to W. The court, following the reference, rendered judgment for the amount found due by the referee. *Held—*

Such judgment is erroneous. The court should have rendered judgment on its own finding, or the finding of a jury, and this should appear from the record.

The court, per FORTÉ, Judge, delivered the opinion as follows:

The case in the common pleas, in which the judgment was rendered which is now sought to be reversed, was \*commenced under the old practice; \$10,000 was claimed by Woolsey on a special contract, and on the common counts. A referee was appointed by the court of common pleas, to take and state an account between the parties, and the referee found that there was due Woolsey from Eldridge upwards of \$10,000. It no where appears that Eldridge ever consented to this reference. No exceptions were taken to this report. The only finding and the judgment in the case were as follows: "The said referee, at this term of the court, made his report, showing a balance due from the defendant to the plaintiff on the first day of the present term of \$10,515.07; and no exceptions having been taken by the defendant, and the court being satisfied with said report, do confirm the same; therefore it is considered that the said plaintiff recover of the said defendant said sum of \$10,515.07 with the costs of this suit to be taxed."

From this record, it no where appears that there was any finding by the court or jury, and there being no inquiry by the court or

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District Court, Cuyahoga County.

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jury, but only a finding that the master had reported a certain sum as due, and that there was no exception taken to the report, judgment was rendered for the amount so found by the master. This is clearly erroneous. The finding should have been by the court or jury, and the judgment should have followed this finding.

Judgment reversed.

Bolton, Kelly & Griswold, for plaintiff in error.

C. Stetson, for defendant in error.

### \*JOINDER OF CAUSES.

BANK OF ROCKVILLE V. AMERICAN EXPRESS CO.

[MOTION.]

Plaintiff inserted in his petition one cause of action against defendant as common carrier and another as warehouseman, claiming to recover only the amount of one of the causes of action. *Held—*

1. The plaintiff cannot be compelled to elect on which cause he will try the case and have the other struck out, as it does not appear they are both for the same thing.
2. If both are one cause of action in fact, whether the petition can be safely sworn to. *Query.*

The plaintiff filed his petition in this case, containing one cause of action against defendant as common carrier, and another cause of action against defendant as warehouseman, both being founded on the same cause of action. Defendant moved to compel plaintiff to elect upon which cause of action it would try the case, and to strike out the other. Judgment was asked only for the amount of one of the causes stated.

The court, per STARKWEATHER, Judge, held—

That the motion must be overruled, because, although judgment was asked for the amount of only one of the causes of action, yet it did not appear from the petition that the two causes set forth were for the same claim in fact, but were stated in the petition as separate and distinct causes of action. Whether, if the two causes of action were for one and the same claim, the petition could be safely sworn to, was another question, and the person swearing to it must take the risk.

Bishop, Backus & Noble, for the motion.

Crowell, against the motion.

**\*REPLEVIN.**

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**BURLINSON V. ROE.****[MOTION TO DISMISS APPEAL IN REPLEVIN]**

In replevin, before a justice of the peace, where the property is appraised at over \$100, the justice has no jurisdiction to try the case, and if he proceeds to final judgment, and an appeal is taken to the common pleas, after judgment in the common pleas, the case can be appealed to the district court, as the proceedings before the justice after the return of the appraisal are a nullity.

This was a motion to dismiss an appeal from the common pleas, because the suit was originally commenced before a justice of the peace, then tried, and verdict and judgment rendered, and an appeal taken to the common pleas. The case was tried in the common pleas, and a verdict and final judgment rendered; and an appeal taken from the common pleas to the district court. It appeared from the files of the case that the property replevied was appraised at over \$100.

The court, per RANNEY, Supreme Judge, held—

That the jurisdiction of the justice over the case was terminated when the constable made his return of the appraisal of the property, showing the value of it to be more than \$100; but instead of then terminating his own proceedings, the justice proceeded in the case to final judgment, and then on appeal certified his proceedings to the common pleas. The proceedings by the justice subsequent to the constable's return were simply void, and the case when it came into the common pleas stood as though no trial had been had, and the common pleas acquired jurisdiction of the case by the transcript of the proceedings from the justice being filed in that court. The fact that other matters or proceedings which \*are utterly void are certified, does not affect the case, and it stands just as though<sup>62</sup> nothing had been certified except what had taken place up to the time of and including the return of the constable, showing the value of the property to be above \$100.

It follows, then, that the common pleas only having jurisdiction of the case, and the justice having none, after the return of the constable, that the case is properly appealed to this court.

Motion to dismiss the appeal denied.

Canfield & Beavis, for the motion.

Lynde & Castle against the motion.

**AMENDMENT OF INDICTMENT.****SMITH & CARROL V. STATE OF OHIO.**

[APPLICATION FOR WRIT OF ERROR.]

1. Inserting in an indictment the date of the commencement of a term at which it was found, and after it has been returned by the grand jury, is an immaterial amendment, and does not affect the indictment.
2. A material defect can be remedied only by a new indictment.

The error assigned in this case was that the court of common pleas permitted the prosecuting attorney to amend the indictment by inserting the date of the commencement of the term of the court at which the indictment was found, in the caption of the indictment.

The court, per FITCH, Judge, held—

That an indictment cannot be amended in any material portion of it. If the indictment is materially defective, it can only be remedied by finding a new one.

\*The defect in this case was not material—the indictment  
63 may be good without a caption

Allowance refused.

R. D. Noble, for plaintiff in error.

S. Williamson, for defendant.

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**† EXECUTION—MEASURE OF DAMAGES.****SEARLES & RIDER V. SETH A. ABBEY, Sheriff.**

[JURY TRIAL.]

Defendant having in his hands an execution against G., after having received a bond of indemnity, levied the execution on goods in plaintiffs' store as property of G., and closed the store, and held the goods for a month, and until on trial of right of property, under secs. 426, 7 and 8 of the Ohio code, on which trial the property was found to be plaintiffs', when it was delivered up to them. *Held—*

1. Defendant was liable for the injury sustained by plaintiffs as at common law, and must make good to them the damages.
2. The rule of damages is the injury done to the property, or loss of any of it while in the Sheriff's hands, including the depreciation of it; to which amounts interest on the whole value of the property which was held by the defendant is to be added.
3. For injury to business, or salary of clerks, or store rent during the time the levy subsists, no recovery can be had against the Sheriff.

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†Motion by defendant for leave to file a petition in error was overruled, in an opinion. 4 O. S., 598.

The plaintiff in this case claimed to be the owners of some \$10,000 worth of goods, and that with these they were engaged in trade in the city of Cleveland, and rented a store and employed a number of clerks, and obtained a large number of customers, and were doing a good business; and while so doing, in the year 1854, the defendant holding an execution in his hands against one Harris B. George, levied the same upon the property in question, after first having demanded and received a bond of indemnity from the plaintiff in said execution. The business of the plaintiffs was suspended in consequence of the levy for nearly a month, and during that \*time they had to pay their clerks and rent. The sheriff under the provisions of the code, (sections 426 to 428), gave notice, and had <sup>64</sup> the right of property tried before a justice of the peace, which trial resulted in favor of the plaintiffs in this action, and the property levied upon was therefore released by the sheriff, and returned to Searles & Rider, some of which was damaged while in the defendant's possession.

The points raised by the parties will appear in the charge to the jury.

RANNEY, Supreme Judge, charged the jury as follows:

The plaintiffs claim to be made good for the injury they have sustained, in consequence of their property having been levied upon by a process against another person, their business broken up for nearly a month, their rent and clerk hire going on at the same time, and their customers permanently lost to them, and their goods injured for want of care.

The defendant claims he acted in good faith, and having proceeded to have the right of property tried after the levy, and after the right of property was found in these plaintiffs, having surrendered the property up to them, he is not liable any further, whatever might be the case, if the plaintiffs in the execution were sued instead of him. He claims he is not liable in any event, for the suspension of the plaintiffs' business, loss of customers, rent, and clerk hire, and injury to the plaintiffs' business generally, nor to the goods while in his possession, as such injury to the goods is not claimed in the petition.

The extent of the defendant's liability depends on the construction which shall be given by the court to the law; and

1. As to the provisions of the statute for the trial of the right of property, it is not clear what the meaning is, \*except, first, when on the trial the right is found against the claimant; and sec- <sup>65</sup>

ond, when found for the claimant, and the sheriff is required to sell the property after receiving, as provided in section 428 of the code. In either of these cases the sheriff is not liable for what is done, especially so in the latter case, after receiving the bond, named in section 428.

Our supreme court has declared the effect of the finding against the claimant, in case of *Patty v. Mansfield*, 8th Ohio Reports, page 369, by holding that he has then no claim upon the sheriff, in case he sells the property on the execution.

Here, after the trial of the right of property resulted in the plaintiff's favor, no bond was given, and the code does not declare the effect in such case, and we are left to ascertain the rights of the parties by the common law.

The defendant being sheriff, and acting by virtue of legal process, will not justify him in taking the property of one person to pay the debts of another; and he can stand in no better position than any other wrongdoer, except the fact that he acted as a public officer in what he did, goes to rebut the presumption of malice on his part.

The defendant, then, is liable to the plaintiffs as a wrongdoer, but the question arises—

2. What is the rule of damages by which this case is to be governed? And here the decisions are conflicting in different states, and this leaves us to fix our own rule, and do justice to the parties as nearly as possible; and this can only be done by making for the sheriff a certain and uniform rule, as nearly as we can. The sheriff has a right to know what responsibility he is incurring \*to the plaintiff in an execution, and to the claimant of property which he may levy upon; his task is a difficult one, as he may be liable in case he does or does not proceed.

We think justice will be subserved by making the sheriff liable for the property from the time he takes it till he restores it to the owner. And this rule will make him answerable as follows:

1. If the property is injured or lost while in the sheriff's hands, he is liable for the actual injury to or value of the goods lost.

2. If the property depreciated in the sheriff's hands, he is liable for that depreciation; that is, for any decline in the market value of the article between the time he took it and the time he restored it. The defendant had no right to take the property from the plaintiff's care, and he must make good any injury, or loss, or depreciation of the same while in his possession; and it is not nec-



essary to allege this depreciation or injury in the petition, as the sheriff was liable for the whole property by the wrongful taking, and can only give in evidence the return of the property, in mitigation of damages, and the mitigation can only be the value of the property when it is returned.

3. Plaintiffs cannot recover for injury to or suspension of their business generally, or salary of clerks, or store rent, as against the sheriff, and it makes no difference that their business was for the time being entirely broken up, and permanently injured; a different rule might prevail as against the plaintiff in the execution.

Finally, you will ascertain the plaintiffs' claim as follows:

1. Give interest on the whole property from the time taken till restored.

\*2. Add to this the value of any article lost.

3. Estimate any injury to and depreciation of the property while in the defendant's hands. To the last two items add the interest from the time the property was restored to the plaintiffs.

Verdict for plaintiffs, \$567.

Williamson & Riddle and R. P. Spaulding, for plaintiffs.

Herrick and Prentiss & Newton, for defendant.

### ASSIGNMENT FOR BENEFIT OF CREDITORS—CHATTEL MORTGAGE.

JASON CANFIELD, TRUSTEE, v. LATHROP, LUDDINGTON, ET AL.

[JURY TRIAL.]

1. An assignment, by a debtor, to a trustee, for the benefit of creditors, will prevail over a prior mortgage, executed by the assignor on his stock of goods, with the understanding by *the mortgagee* and mortgagor, that the mortgagor might continue thereafter to deal with the property as his own, provided the understanding is strictly proved.
2. A chattel mortgage, if the mortgagor resided in the township of Brooklyn when it was executed, must be deposited in the clerk's office of Brooklyn township, although that part of Brooklyn township in which the mortgagor resided was also in the city of Cleveland.
3. If C. knew of the mortgage when he became the assignee of the property he was not a purchaser in good faith, and it was not necessary to the validity of the mortgage that it should be deposited in any clerk's or recorder's office.

This was an action brought to recover the value of certain property, which one Wells had assigned to plaintiff for the benefit of Well's creditors generally.

On the 15th day of July, 1854, Wells being indebted to Lathrop & Luddington in the sum of \$1,400, executed to them a mortgage on his stock of goods, in Brooklin township, being that part of the city of Cleveland west of the river. The assignment was made to Canfield on the 7th of August, 1854. Canfield took possession under \*the assignment, and the defendants took forcible possession of the property while Canfield so had it in charge, and soon after the assignment, they claimed the property under the mortgage. Plaintiff claimed that the mortgage had not been duly recorded, as it was deposited in the county recorder's office in Cleveland township and city, Wells living in that part of the city of Cleveland in Brooklyn township. Plaintiff also claimed that the mortgage was void, because there was an understanding between the mortgagor and mortgagees, when the mortgage was executed, that the mortgagor might retain possession and sell and dispose of the property mortgaged, for his own benefit, although there was no such provision in the mortgage.

The court, per STARKWEATHER, Judge, charged the jury substantially—

That the question was, which party had the right to this property; that the plaintiff's claim was by virtue of an assignment for the benefit of all the creditors of Wells; and the defendant, by virtue of his chattel mortgage; that whichever party showed the prior right must succeed.

The mortgage being earlier than the assignment, that must prevail, if valid; that it was good on its face, but that plaintiff sought to impeach it—1st, because not properly recorded; 2d, because accompanied by an agreement when it was made, that the mortgagor might remain in possession of the property, and sell the property for his own benefit, the same after the mortgage was made as before.

That as to the recording the mortgage, if the mortgagor resided in the township of Brooklyn when the mortgage \*was executed, then it was not properly recorded; for the recorder's office is in the *township of Cleveland*, and it makes no difference that the portion of Brooklyn in which Wells resided was a part of the city of Cleveland.

But the recording of the mortgage in the wrong office will not render the mortgage void, if the plaintiff knew when the transfer was made to him that such mortgage existed; for if he did he could not be a purchaser in good faith; nor was he a creditor of

Wells. If then Canfield had notice of the mortgage, he was not a purchaser so as to protect him against the mortgage, provided the mortgage is good in other respects.

But if, as plaintiff claimed, there was an agreement between Wells and the mortgagees, that he might sell and dispose of the property for his own use, after the mortgage was made, the same as before, and he remained in possession and control of it at the same time, then the mortgage was void. There must have been an understanding that this should be the state of things, not by Wells only, but the mortgagees must have had this understanding as well as Wells. If the plaintiff fail in proving this, the mortgage was valid against the plaintiff, if he had notice of it when he took the assignment.

The jury rendered a verdict for plaintiff, for \$2,620.40.

Defendants moved for a new trial, because the verdict was against the law, as given to them by the court; that it was contrary to evidence, and the damages were excessive.

On the hearing on the motion, RANNEY, Supreme Judge, delivered the opinion of the court, holding—

That the case showed the mortgage to have been given for an honest debt; that the charge was that the \*mortgage was not properly recorded, but that if Canfield knew of the mortgage to Lathrop & Luddington when he took the assignment, then it was not necessary that the mortgage should have been recorded in order to make it good, if it was valid otherwise; that the proof was clear that Canfield knew of this mortgage. <sup>70</sup>

That on the point "that if the goods were left with Wells, to be dealt with for his own benefit, after the mortgage, by an understanding between the parties thereto, not contained in the deed, the mortgage would be void in law"—the court said that as this was going a step further than the supreme court had gone, though it had been held so frequently by district courts, the party setting up *this understanding* to avoid the mortgage must be held to strict proof. That proof was wanting here; and for both of these reasons a new trial must be granted.

Griswold & Loomis, for plaintiff.

C. Stetson, for defendants.

## ASSIGNMENT OF AN INSOLVENT BANK.

71 \*JOHN M. ARMSTRONG, RECEIVER OF THE CANAL BANK OF CLEVELAND,

v.

JOHN G. GRANNIS IN THE CASE OF AN ATTACHMENT IN FAVOR OF THE STATE OF OHIO V. SAID BANK.

[ TRIAL BY JURY. ]

1. An assignment by an Independent Bank, incorporated under the General Banking Law of Ohio, passed February 24, 1845, providing for the payment, 1st, of the circulating notes of the Bank, 2nd, for the payment of the other indebtedness ratably, 3rd, for payment of the surplus, if any, to the stockholders, is not void, although made in the view of *general* insolvency, provided it is not made in contemplation of suspending specie payments on its circulating notes.
2. If such assignment is made for the purpose of preventing the assets of the Bank from going into the hands of a receiver, to be appointed by the State officers, in case it should suspend specie payments, and to keep them under the control of persons of its own selection, the assignment is a fraud on the law under which the Bank is chartered, and is void.
3. If the object of the assignment be to defraud creditors, or if the *principal* object of the assignment be to hinder and delay creditors, it is void. But if the object in view in making the assignment be lawful, although made with the intent to delay creditors so far as may be necessary to secure the object in view, the assignment is valid.
4. A transfer by the assignees to the receiver appointed by the State officers, after *the act* of insolvency contemplated by the statute is committed, of all the assets coming to them by the assignment, vests in the receiver all interest and rights which the assignees took by the assignment.

This suit was brought by the plaintiff in his official capacity of receiver, claiming certain property which was attached by the sheriff of Cuyahoga county, on the 13th day of November, 1854, in the case of the state of Ohio, commenced and prosecuted at the instance of H. A. Ackley v. the Canal Bank of Cleveland. Defendant admitted the appointment of plaintiff as receiver on the 29th day of November, 1854, but claimed that the title of defendant related back to the date of the attachment, which was prior in time to the appointment of the \*plaintiff as receiver of the bank.

72 Plaintiff admitted the fact of the attachment being prior to the plaintiff's appointment as receiver, but offered in evidence —

1. An assignment by the Canal bank, dated November 9, 1854, properly executed, purporting to be a transfer of all the effects of the bank to W. J. Gordon, I. L. Hewitt and W. H. Huntington.

2. A release and transfer by said Huntington of all interest, legal and equitable, in the assets of the bank derived by said assignment, to E. F. Gaylord, November 13, 1854.

3. An assignment by said Gordon, Gaylord and Hewitt, of all the assets assigned to them by the instruments aforesaid, dated December 12, 1854, to the plaintiff as receiver.

4. A further assignment, dated December 14, 1854, covering the same assets as those in the one last named, and more especially such as were claimed by the plaintiff in this action.

The execution of these several transfers being severally proved, the plaintiff's attorneys offered the same as evidence to the jury; but their reception was objected to by the defendant's attorneys, who claimed that the plaintiff could not derive title through the first or of the subsequent ones, which were dependent on the first—

1. Because the Canal bank was an independent banking institution, and by the law of February. 24, 1845, under which this bank existed, the bill-holder was amply secured by a deposit of stocks of the state of Ohio, or the United States, with the treasurer of state; and the assignment by the bank purported to \*make a provision in the first place for the bill-holder in preference to other creditors. <sup>73</sup>

2. Because by section 41 the law had prescribed how a receiver of an insolvent bank should be appointed, that the legislature had devolved this duty upon the secretary, treasurer and auditor of state, and that this assignment by the bank was a fraud on that law and void—that it was a contrivance to appoint its own assignees to evade the statute.

3. To release to Gaylord by Huntington was objected to because Huntington could not divest himself of the trust, and Gaylord could not take it in this manner; it must be by order of court, etc.

4. That the conveyances by the assignees to the plaintiff could not convey anything to him as receiver.

Plaintiff's attorneys maintained that the assignment was not in fraud of the statute, but in pursuance of it; that although it was in contemplation of insolvency, as applied to individuals, yet it was not in contemplation of *the* insolvency named in the statute, which was a failure to redeem its circulating notes in specie.

The court, FOOTER, Judge, presiding, overruled the defendant's objections, for reasons appearing in the charge to the jury.

The plaintiff then offered testimony, showing that at the time

of the assignment by the bank, the whole possession and contro of its assets were transferred to the assignees, and that subsequently they, and at the time of their assignment to the plaintiff, transferred to him the same assets.

74 \*The defendant's attorneys then offered testimony for the purpose of impeaching the assignment by the bank, for various reasons; and the plaintiff offered testimony for the purpose of sustaining it—all which will appear in the charge of the court.

The defendant's attorneys interposed other objections to a recovery by the plaintiff, which will also appear in the charge.

FOOTÆ, Judge, charged the jury as follows:

This action is brought to determine the right of possession of the property in question, which was and perhaps still is the property of the Canal bank. There is no question but that on the 9th day of November, 1854, the property in controversy belonged to the bank; nor that on that day an assignment was made to trustees, who accepted the trust; nor that one of these rustees released to E. F. Gaylord, who also accepted the trust and entered upon its performance. The assignment provided for the application of the assets of the bank, after the same should be converted into money, in the first place to the payment of the circulating notes of the bank, and then to the payment of the other indebtedness of the bank ratably, and the surplus, if any, to be paid to the stockholders of the bank.

There is no controversy that afterwards, and on the 13th day of November, the property in question was attached by the sheriff, in the action of the state of Ohio against the bank; that the defendant was appointed receiver of the property so attached.

It is not controverted that on the 29th day of November, 1854, 75 the plaintiff was duly appointed receiver of \*the bank, it having committed the act of insolvency contemplated by the statute, after the assignment of the 9th of November, had been made.

After the plaintiff's appointment of receiver, the trustees under the assignment by the bank, conveyed to the plaintiff as such receiver, who caused himself to be made a party defendant in said action of the state of Ohio against said bank, and a judgment was rendered against said bank in said action, at a term of the court of common pleas, 1855.

The defendant claims that the judgment in favor of the state of Ohio against the bank is a bar to the claim set up by the plaintiff in the suit; that judgment determined conclusively the amount

of the bank's indebtedness to the state of Ohio, and the receiver of the bank as well as the bank itself, is bound by it; but that judgment determined nothing as to the right of the plaintiff as receiver to the possession of the property in question, and cannot operate to prevent him from recovering in the action.

The defendant further claims that the plaintiff cannot recover for the reason that the assignment by the bank to trustees is void on its face. We cannot say that this assignment is void on its face, and the conveyances to the plaintiff are sufficient to vest in him, in his official capacity, all that the assignees of the bank took, by the assignment to them, and if there is nothing else in the case to prevent it, the plaintiff must recover. If the plaintiff has no right by virtue of these transfers, then clearly he cannot succeed, as the attachment under which the defendant claims is prior to the appointment of the plaintiff as receiver, and we are brought to this question: Whether the conveyance by the bank to trustees on the \*9th of November, 1854, for the benefit of creditors, is, by reason of anything not apparent on its face, void as against the creditors of the bank. 76

It is claimed by the defendant, that the circumstances under which it was made, and the object of the assignment, render it utterly void.

It is said: It was made in contemplation of committing an act of insolvency, and, therefore, a fraud upon the statute and an invasion of its provisions.

The 41st section of the general banking law of February 24, 1845, and under which the canal bank existed, provides that, when it shall be made to appear to the treasurer, secretary and auditor of state, or a majority of them, that an independent banking company has committed an act of insolvency by refusing to redeem its circulating notes, on demand, in gold or silver, during banking hours, then said treasurer, secretary and auditor, or a majority of them, shall appoint a receiver of the effects of such bank.

And we instruct you upon this point, that if the assignment by the bank was made in contemplation of the commission of an act of insolvency, it is void. Or if the bank, without any positive intention at the time to commit an act of insolvency, regarded it as something which must necessarily or would probably happen, and made the assignment with the intent, in case it should happen, to prevent its assets from going into the hands of a receiver to be appointed by the state officers, and to keep them under the control

of persons of its own selection, the assignment is a fraud upon the law, and is void. But, the act of insolvency contemplated, in order to produce this effect, must be *the act* mentioned in the statute, that is, a refusal on the part of the bank to redeem its circulating notes, as \*required by the statute. And if the directors and 77 officers of the bank, at the time of the assignment, regarded the bank as in an insolvent condition, but did not contemplate the commission of an act of insolvency by suspending specie payments, as necessarily or probably to happen, then there is nothing in this objection to invalidate the assignment.

The defendant further insists that the assignment was made with the intent to hinder and delay the creditors of the bank, and is for that reason void.

We have a statute which provides that all conveyances made with the intent to defraud creditors shall be void. To bring a case within the provisions of this statute, it is not necessary that there should be an intention to cheat any creditor out of his debt or any portion of it. It is sufficient if the principal object and purpose of the parties to the conveyance be to hinder and delay the creditors of the grantor in the collection of their debts. An intention to *delay* creditors is not the same thing as an intention to *defraud* creditors. A conveyance made with intent to *defraud* creditors, is absolutely and unqualifiedly void. And a conveyance made with intent to *delay* creditors is also void, provided the principal inducement to the making of the conveyance be to delay creditors. But if the principal motive to the conveyance be the accomplishment of some other object, in itself lawful and proper, as to pay off one creditor in preference to another, or to make an equitable distribution of property among all the creditors of the grantor, the conveyance is valid, although made with the intent to delay creditors so far as may be necessary to secure the object in view. In such a case the delay to creditors is incidental to the conveyance and follows, as a necessary consequence from \*the exercise by the parties of their right to effect the principal 78 object of it. The Canal Bank of Cleveland, so long as it did not contemplate the commission of an *act of insolvency*, had a right to convey its property to one creditor in preference to another in payment of a debt, and to convey its property to trustees in trust for the payment of its debts, and the delay to creditors incident thereto, or resulting necessarily therefrom, whether intended or not, would not affect the validity of the conveyance.



If, then, the assignment in question was made by the bank in good faith, for the purposes expressed on the face, with no intent further to delay creditors than would be necessary in carrying out its provisions in a proper manner, it is not void, as being made with intent to delay creditors. But if it was made as a mere temporary arrangement, to be carried into effect or not, as the bank should direct, or if the principal object of making it was to delay or embarrass the creditors of the bank as a means of obtaining terms from them which would enable the bank to continue its business, or of making sale of its charter, or in any other way of benefiting the bank, and the bank did not in fact under and pursuant to the assignment make an absolute and unqualified surrender of the property embraced in it for the purposes therein expressed, without reservation, condition, or limitation, then the assignment is void.

Verdict for plaintiff.

S. J. Andrews and Mason & Estep, for plaintiff.

Spaulding & Parsons, J. Adams and S. B. Prentiss, for defendant.

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\*U. S. CIRCUIT COURT, N. D. O.

JULY TERM, 1856.

BEFORE HON. JOHN M'LEAN, OF THE SUPREME COURT, AND HON. H. V. WILLSON, OF THE DISTRICT COURT.

### ASSIGNMENT FOR BENEFIT OF CREDITORS—NEW TRIAL.

WILLIAM S. WICKHAM & WILLIAM S. GOSHAM, v. MOSES DILLON.

1. A judgment obtained in the absence of defendant and his counsel, when the counsel was prevented from attending the trial by sickness, will be set aside on motion, and a new trial granted.
2. An assignment made by G., a citizen of Virginia, of personal property situated in Ohio, to assignees, for the benefit of G.'s creditors, the assignees also being citizens of Virginia, is a contract made in and to be governed by the laws of Virginia.
3. When such assignment stipulates—1st, for the payment of the expenses of the execution of the trust—2d, for the distribution of the proceeds to such creditors as within six months shall come in and assent to the terms of the assignment, by subscribing a release of the assignor from any claim for any balance remaining due such creditors after receiving their dividend under the assignment—3d, for excluding from benefit under the assignment any creditor who may issue legal process either against the goods or body of the assignor—4th, that the residue shall be distributed among such creditors as shall not within six months release the assignor from all liability—5th, that the surplus, if any, be paid to the assignor—it is valid by the laws of Virginia, and will be sustained in this State, when the transaction is not fraudulent in fact.
4. Placing property in the hands of trustees for the benefit of creditors, negatives the idea of fraud.

WILLSON, J.

This is a motion to set aside the judgment obtained by the plaintiffs at the July term, 1855, and for a new trial.

\*Two causes are assigned in support of it. The first is, that  
80 the case was tried in the absence of the defendant and his counsel, and that said counsel were unavoidably absent through sickness. Second, that the verdict is against the evidence.

The court would grant this motion without hesitation on the first cause assigned. But as all the evidence in the case is in writing, we are asked by counsel on both sides, to review it, and

grant or overrule the motion as the law and the testimony shall appear in the examination of the case on its merits.

The case is in trover, brought by the plaintiffs, (as assignees and trustees of Marx Graff, of Virginia,) to recover the value of twenty boxes of dry goods. The defendant claims to hold these goods as sheriff, by virtue of a writ of foreign attachment, issued by the court of common pleas of Jefferson county, Ohio, against Marx Graff, at the suit of Martin Lewis & Co.

From the evidence on file, it appears that in the summer of 1851, Marx Graff, a resident merchant of Wheeling, had become largely indebted to eastern creditors for goods and merchandise. Of these goods, on their arrival at Wheeling, (and before being unpacked), in August, 1851, he sold to Raphael Myerson twenty-seven boxes for \$8,000, and took his note for the amount. Myerson shipped the goods from Wheeling to Steubenville, in the state of Ohio, and on the 2d of September placed them in store with Alexander Doyle, and took from him a warehouse receipt for the same. The goods remained in Doyle's warehouse until the 19th of November, at which time the plaintiff Wickham took possession of them by virtue of said warehouse receipt, and a written order of that date from Myerson to Doyle, for the delivery of the property to the plaintiffs. This order and the warehouse receipt were taken by the plaintiffs, as assignees of Graff, in discharge of Myerson's note of \$8,000.

On the 21st of November, while the plaintiffs were in the act of transshipping these goods at Steubenville, the defendant Dillon, acting as sheriff of Jefferson county, seized and took into his own possession twenty of said boxes of goods, under and by virtue of the attachment process of Martin Lewis & Co. aforesaid.

The plaintiffs claim title to the goods in question from Graff, who, on the 19th of November, 1851, executed and delivered to them at Wheeling in the state of Virginia, a deed of trust of all his property for the benefit of his creditors, without any reservation whatever in restriction of title. The trust deed was duly acknowledged and recorded on the day of its execution and delivery, and the conveyance in all respects as to form was made in accordance with the laws of Virginia.

This deed of trust provides, that the trustees shall sell the property as may seem proper in their discretion, on credit or for cash. They shall first pay the costs which accrue in the execution of the trust. "They shall disburse the residue in payment and

satisfaction, *pro rata*, of all other just debts due or to become due from the said Marx Graff to any creditor or creditors, who shall, within six months from the date of this deed, assent to the terms thereof by subscribing a release to be appended thereto, whereby the said creditor or creditors shall, in consideration of his or their claim or debt coming in for participation of the said balance *pro rata*, discharge and forever release and acquit the said Marx \*Graff<sup>82</sup> and his representatives from all responsibility for any portion, if any, of such debt, claim or demand as remains in the *pro rata* distribution of said balance—excepting, however, expressly from all benefit under the operation of this deed, any creditor or creditors who may within that period issue any legal process against the goods of the said Marx Graff, or against his person; and the residue of said fund, if any remain, shall be divided *pro rata* among those creditors who shall fail and refuse to come in and within said six months execute and deliver such release; and the residue, if any, they shall pay over to the said Marx Graff or his assignees.”

At the time of these transactions, the plaintiffs, Myerson and Graff, were all citizens and residents of Virginia, and the sales and paper transfer of title to the property named, were made in the city of Wheeling.

Upon this statement of facts, three questions of law are presented for our consideration:

1. Is this deed of trust, in construction and effect, to be governed by the laws of Virginia, where it was made and where the parties to it resided, or is it to be governed by the laws of Ohio, where the property is found?

2. If the former, is the deed then valid and effectual in Virginia for the legal transfer of the property?

3. Is there such evidence of fraud on the face of the transaction, that will make the transfer void, as to creditors?

It is a principle of international law that courts shall take notice of and give effect to the title of *foreign assignees* of an insolvent debtor, whether the insolvent made the transfer himself, or the laws of the state of his \*domicil made it for him;<sup>83</sup> and it is for this reason, that the succession to and distribution of personal property is regulated by the law of the owner's domicil and not by the *lex loci rei sitae*. This rule is founded, as well in the necessity to secure justice by avoiding conflicts of jurisdiction in matters affecting title, as to promote comity among states and nations.

In the case of Phillips v. Hunter (2 H. Blac. R., 402) this question came before all the judges of the exchequer chamber on error from the King's bench. That high court fully sustained the principle as laid down by Lord Camden in Joliet v. Deponthieu, decided in 1769, and adopted, as sound law in England, the decision of Lord Kenyon in Hunter v. Potts (4 term R., 182). This last case established the great doctrine, that the title of the foreign assignee of an insolvent debtor's estate, under the law of the bankrupt's domicile, was to be preferred to the subsequent attachment of the domestic creditor, made (in that case) in America under the law of Rhode Island. And it has been decided over and over again by the English courts, that a failing debtor, before the actual issuing of the commission of bankruptcy, might assign his property *abroad* as absolutely as if it had been in his own tangible possession; and that such assignee was entitled, by operation of law, to deal as he might have done with his property.

The *lex domicilii*, in respect to personal property, has been adopted by the highest judicial tribunals in the United States, and in so doing our courts have broadly declared, that in the general disposition by the owner of personal property in one country, it will effect it everywhere, because in regard to the owner's control \*over it, *personal property has no locality*. The application of this principle impairs no right, but promotes general justice, and is founded on the mutual respect, comity and convenience of commercial states and communities. Bank United States v. Donnally, 8 Peters R., 371; 4 John Ch'y R., 460; 8 Paige R., 446-519.

The *status* or capacity of Graff, therefore, to make the deed, and the construction and effect of the deed itself, depend on the laws of Virginia. What, then, is the legal effect of this deed in Virginia?

It is urged that the deed is *void*, because it is made to prefer creditors.

By the 6th section of the ordinance of convention, the state of Virginia adopted the common law of England, and the acts of Parliament of a general nature in aid thereof, prior to the 4th year of the reign of James the First. That ordinance, which was adopted in 1776, is still in force, except in such modifications as have been made by the legislature of the state. It is not pretended, however, that any such modification has been made, affecting the right of a failing debtor to so dispose of his prop-

erty, as to make a preference in the payment of his creditors. The common law of England declares that "it is neither immoral or illegal to prefer one set of creditors to another." In *Num. v. Wilshire*, 8 T. R., 528, Lord Kenyon says, "putting the bankrupt laws out of the case, a debtor may assign *all of his effects* for the benefit of *particular* creditors." And in the case of *Small v. Audley*, 2 P. Wms., 427, where an assignment was made to a favored creditor, to secure money lent by him to a merchant only the day previous to the commission of the act of bankruptcy, the court,\*in deciding the case, said, "There may be just reasons for  
85 a sinking trader to give a preference to one creditor before another—to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may be only a just debt, but all that such creditor has in the world to subsist on; in such case the trader honestly may, nay ought, to give the preference." In language equally strong, the same principle was maintained by the court in *Cook v. Goodfellow*, 10 Mod. R., 489, and so of numerous other English cases.

Under the ordinance of 1776, the highest judicial tribunal of Virginia has adopted the decisions of the English common law courts on this question.

Mr. Justice Carr, in giving the opinion of the court of appeals in *McCullough et al, v. Somerville*, 8 Leigh's R., 427, says, "it is unquestionable that a debtor in failing circumstances may prefer one creditor or one set of creditors to another; nor is his right to do so at all weakened or impugned by the maxim that equality is equity. This maxim is justly a favorite one in the courts of equity in cases to which it applies; but cannot be permitted to interfere with the right which a debtor has to secure this or that creditor or class of creditors in preference to others."

I know this doctrine is repugnant to the legislative policy of the state of Ohio. But it is the law of the domicile of the parties where the deed was made, and that law obtains in giving effect to the deed, and in transferring the legal title to the property, unless there is something else in the transaction which renders it fraudulent \*in contemplation of law; and this brings us to the only re-  
86 maining question in the case: Is there such evidence of fraud in the transaction or on the face of the deed, that will make the transfer void, as to creditors?

The original sale of goods by Graff to Myerson, would doubtless have been declared fraudulent, had the goods, while in the hands of Myerson, been seized under legal process against Graff by his creditors. The circumstances of that sale had all the indicia of an intent to defraud creditors. The facts that the goods were purchased by Myerson without examination—and without being unpacked from the original boxes and sent hastily out of the state, would be sufficient to raise a legal presumption of fraud in a contest between Myerson and an attaching creditor of Graff. But the assignment to the plaintiffs by Graff of all his property for the benefit of his creditors, on the 19th of November, and the subsequent canceling of the \$8,000 note, and the receipt of the goods therefore by the assignees, placed the whole matter upon a footing as if no sale had been made to Myerson at all. The goods and property being placed in the hands of trustees to pay creditors, negatives any presumption of intent to defraud creditors. If the deed is valid and effectual for the purposes intended by it, then the title to the goods was perfected in the plaintiffs, and they were not thereafter subject to legal process against the assignor.

But it is said this deed has the evidence of fraud on the face of it, inasmuch as it demands a general release of the whole debt of each of the creditors, upon the payment of a part.

If Graff gave up all his property, and in doing so had a right to pay one in exclusion of others, with what propriety can he be charged with fraud, because he preferred those who should relinquish all claim upon his future earnings? To set aside this deed as fraudulent, because in its provisions those creditors are preferred who accept its terms, is really to deny the right to prefer at all; and this right, we have seen, is clearly established in Virginia. Where the failing debtor has assigned all of his property for the benefit of his creditors, and where there is no concealment, it is in accordance with the current authority of all the English cases, that such compromises are just and lawful. (*Jackson v. Lomas*, 4 Term R., 166). So in *Brasher v. West et al.*, 7 Peters, 615. Chief Justice Marshall in deciding the case, says: "Humanity and policy plead so strongly in favor of leaving the product of his future labor to the debtor who has surrendered all his property, that in every commercial country, except our own, the principle is established by law; and this furnishes a very imposing argument against its being a fraud." The authority of this last case was fully recog-

nized by the Virginia court of appeals in Skipwith's Exr's v. Cunningham, 8 Leigh, 271, when the court unhesitatingly sustained a deed nearly similar in all of its provisions to the one now drawn in question before this court. There the deed was made by Richard M. Cunningham to Brodnax and Osborn, by which Cunningham, a failing debtor, conveyed all of his property (excepting notes to the amount of \$800, which he retained to pay honorary debts,) in trust for the benefit of his creditors. By the terms of the deed, the trustees were, in their discretion, to sell the property for cash, or on credit, and out of the proceeds to pay first the expenses of the trust, and then to pay and satisfy all the claims specifically enumerated, as \*debts of superior honorary obligation, and disburse the  
88 residue in the payment *pro rata* of all the just debts due from said Cunningham to any other creditor or creditors who should, within four months after the date of the deed, assent to the terms thereof, by subscribing a release to be appended thereto, whereby the said creditor or creditors should in consideration of his or their claim or debt coming in for participation of the said balance, *pro rata*, discharge and forever acquit the said Cunningham, his heirs and administrators, from all responsibility for any portion (if any) of such debt or claim as might remain unpaid in the *pro rata* distribution of the said balance—excepting, however, from all benefit under the operation of the deed, any creditor or creditors, who might within that period issue any writ of *habias ad satisfaciendum* against the body, or writ of *feri facias* against the goods, or other process of execution against the lands of said Cunningham, etc.

The deed of Cunningham was sustained in every particular by the Virginia court of appeals.

It is not a little singular, but so it is, that the deed from Graff to his trustees, in *purpose and terms*, is almost in *haec verba*, with that of Cunningham to his trustees. Hence the facts in the case before us are substantially *res adjudicatae*.

We therefore hold that the legal title of all Graff's property became vested in the plaintiffs by virtue of the deed which is in evidence, and that such title was a barrier against any process at law against the property.

The motion for a new trial is overruled.

D. Peck, for plaintiffs.

Stanton & McCook, for defendants.



## \*CASES DECIDED

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IN THE

## CUYAHOGA COMMON PLEAS,

FEBRUARY TERM, 1856.  

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## APPROPRIATION OF LAND.

CLEVELAND &amp; MAHONING RAIL ROAD COMPANY V. JOHNSON &amp; PERKINS.

[ERROR.]

The Probate Court has *jurisdiction* to settle the rights of parties to money paid into said Court, in cases where proceedings have been had in the Probate Court for the appropriation of lands by a Rail Road Company.

This was a case originally instituted in the probate court, for the purpose of appropriating lands. The lands were appropriated, the damages were assessed by a jury, and the money paid into the probate court of said county. It appeared that Jacob Perkins, a defendant, claimed an equitable interest in some of the land appropriated, and he filed a motion in the probate court to have the portion to which he claimed himself as equitably entitled, awarded to him. It was claimed by Johnson, the other defendant, that the probate court had no jurisdiction to settle the interests of the parties to this fund, and asked the court to dismiss the motion of Perkins for want of jurisdiction, which the probate court did. The counsel of Perkins therefore excepted, and by petition in error<sup>90</sup> brought the proceedings into this court to reverse the proceedings of the probate court in dismissing the motion of Perkins.

On the hearing in the common pleas, FORTÉ, Judge, held—

That if the probate court had no jurisdiction to settle the rights of these parties and distribute this money, then the probate judge must become a party litigant to a proceeding in this court for the distribution. That the legislature did not so intend when the law was passed; but it was intended in this, as in other cases where money is paid into court, that the court into which money was paid should have the final disposition of it; that it will not be going too far in saying that the court having jurisdiction of the mat-

ter of ascertaining by jury the damages to be awarded for the appropriation of the land, and of receiving the amount of such damages, shall like other courts have full control over the money paid into it in such cases. It therefore follows that the probate court had jurisdiction to settle the rights of the parties to the funds in question, and to distribute the fund according to its finding. The judgment of the probate court that it had not such jurisdiction, is therefore reversed.

Backus & Noble, for Perkins.

Bolton, Kelly & Griswold, for Johnson.

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## 91      \*PROCEEDINGS IN AID OF EXECUTION.

### ABNER STONE V. ERASTUS SMITH.

Under section 459 of the Code, in a proceeding in aid of execution, nothing can be done further than examine the judgment debtor. No further order can be made when it appears that a third person has a claim on the property sought to be subjected; his right can be affected only by a trial by a court or jury, in the ordinary way.

The plaintiff asked an order on defendant, to pay into court, or into the hands of a receiver, a certain claim which he held in his possession, to be collected, and the proceeds applied on the plaintiff's judgment against defendant.

This was a proceeding under section 459, and no one was made party but said Smith. It appeared by examination of the defendant, that he was indebted to some person, and to secure him he had appropriated the claim sought to be subjected to secure such indebtedness, but that this appropriation was without the knowledge of the one to whom he was indebted.

STARKWEATHER, Judge, held—

1. That a proceeding under section 459, could go no further than the examination of the judgment debtor; that no order could then be made, and when the examination was concluded the object of the section was accomplished and the proceeding must be dismissed; that the object was a disclosure as to his property, all of which had been obtained.

2. That it appearing from the examination of Smith, that some other person had, or might have an interest in the claim

## Farmers' Bank of Ripley v. Williams.

sought to be subjected, this court would \*not in this summary manner pass upon the rights of the parties, but another proceeding must be instituted to settle such right. 92

That the party claiming property had a right to his day in court and to a trial by jury.

Motion of plaintiff denied. Proceedings dismissed.

## USURY.

## FARMERS' BANK OF RIPLEY V. H. D. WILLIAMS.

1. The discount of a draft drawn in Ohio on a Bank in New York city, "acceptance waived," having ninety-five days to run, and discounted by a branch of the State Bank of Ohio, is not usurious because the branch bank reserved interest at the rate of 6 per cent. per annum, without allowing for the difference in sight exchange (which was  $\frac{1}{4}$  per cent.) between the place where discounted and the city of New York, without it is made to appear that this species of paper discounted is worth more than par.
2. Such transaction must be governed by the 61st section of the law of Ohio, passed February 24, 1845, to incorporate the State Bank, etc., and not by section 4 of the act of 1850 (Swan's Statutes, 1854, page 106).
3. If at the time of the discount the draft was worth more than par, it would tend strongly to show that the transaction was usurious.

FOOTR, Judge, delivered the opinion—

This was a suit on a draft drawn by the Canal Bank of Cleveland, to the order of defendant, and by him endorsed, for \$2,500, on the Continental bank, New York, "acceptance waived," dated August 15, 1854, and having ninety-five days to run. Plaintiff discounted this draft, reserving interest at the rate of 9 per cent. per annum, and allowing nothing for the difference in exchange between Ripley, Ohio, and New York city, which was on sight drafts three-fourths of one per cent. at the time the discount was made, and one per cent. and over when the draft matured.

\*Defendant claims that he is exonerated from the payment of this draft, because no allowance was made in the discount for the exchange or premium, which, added to the interest deducted by the bank on the discount of the draft, will make the transaction usurious under the 61st section of the act passed February 24, 1845, for the "incorporation of the state bank of Ohio," etc., under which act the plaintiff was organized. This 61st section prohibits the taking of more than at the rate of six per cent. per annum in the discount of paper. It then provides as follows: "But the purchase, discount or sale of a bill of exchange payable at another place than the place of such purchase, discount or sale, at the current discount or premium, shall not be considered as a tak-

ing, reserving or receiving interest, provided no agreement or understanding shall be made that the same shall be paid at any other place than that at which it is made payable."

Plaintiff says it was authorized to take interest as it did, without allowing for this premium, by the 4th section of "An act to restrain banks from taking usury," passed March 19, 1850, (Swan's statutes, 1854, p. 106.) Also because this draft was not worth more than par. This 4th section restrains the bank from receiving or reserving any sum, as interest on any paper payable out of this state, when added to the current rate of exchange or premium in such paper, will make the sum received as discount or interest greater than at the rate of twelve per cent. per annum.

This is not an enabling act, but is merely restraining, and does not conflict with any other positive provision of this or other acts in relation to the subject of taking usury \*by banks, and 94 we must look to other provisions, and see what rights are conferred by them.

By the 61st section above referred to, it will be seen if more than the prescribed rate of interest is received, it works a forfeiture of the whole debt.

By the act of February 24, 1848, (Swan's Statutes, 1854, page 104, section 4,) this forfeiture could be established only by an action in the name of the person or persons from whom the illegal interest had been received, and the amount when recovered was to go to the use of common schools.

This last provision has been repealed by the 1st section of the act of 1850 aforesaid, and by such repeal the said 61st section has been reinstated, and stands precisely as it did originally.

This has been so held in case of the Preble County Bank v. Russell et al., (1 Ohio State Reports, 313).

This case, then, is to be governed by the 61st section of the law "incorporating the state bank of Ohio," etc.

The question then is—*Has by that section usury been taken in this case?*

To solve this question, it will be necessary to answer another.

Is the discounting of this kind of paper without allowing the premium of 3-4 per cent., which was the premium at Ripley on sight exchange on New York at the date of this discount, usurious?

There would be but little difficulty to find that usury had been taken if this was an ordinary thirty day draft on New York, and the premium was 1 per cent. on it, and it had been discounted and

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**Farmers' Bank of Ripley v. Williams.**

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interest reserved at the rate of 6 per cent. per annum, and no allowance made for the premium. But this is not that kind of paper. It is \*payable 95 days after its date, "acceptance waived," and it should be shown that this kind of paper had a market value above <sup>95</sup> par when and where it was discounted. This has not been shown here. It not so appearing, the plaintiff is entitled to recover. If it were proved that this paper was above par where it was discounted, it would tend strongly to show that the bank meant to take more than six per cent. interest in discounting it. No such proof, however, appears.

Judgment for plaintiff.

Prentiss, Prentiss & Newton, for plaintiff.

Bishop, Backus & Noble, for defendant.

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NOTES OF CASES DECIDED  
IN THE  
SUPREME COURT OF OHIO.

[April Term, 1856.]

NOT IN VOL. IV, OHIO STATE REPORTS.

**QUIETING TITLE.**

CHARLES BUTLER et al *vs.* HENRY B. CURTIS et al. Bill of Review, from Lucas county.

J. R. SWAN, J., delivered the opinion of the Court. *Held—*

That the vendee of a judgment debtor, who has not paid the purchase money, but has received a conveyance from the judgment debtor, cannot sustain a bill to quiet his title against a purchaser of the land under a judgment rendered after the contract of sale, unless he has paid or brings into Court the purchase money.

BARTLEY, J., dissented.

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**TAX SALE.**

†JOHN DOE *ex dem.* ATEN *vs.* DANIEL STEWART. Error, from Athens county.

J. R. SWAN, J., *held—*

That a description upon a duplicate, and a sale for taxes of a tract of land as one hundred and fifteen acres, part of sec. 36, N. W. corner, is defective, unless the one hundred and fifteen acres were situate in the N. W. corner of the section, and in a square form.

Judgment below affirmed.

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**QUO WARRANTO.**

†THE STATE OF OHIO, on the relation of the Prosecuting Attorney of Sandusky county, *vs.* RALPH P. BUCKLAND, EBENEZER LANE, and others. Information.

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† This case is reported in full, in 5 O. S., 257.

† This case is reported in full, in 5 O. S., 216.

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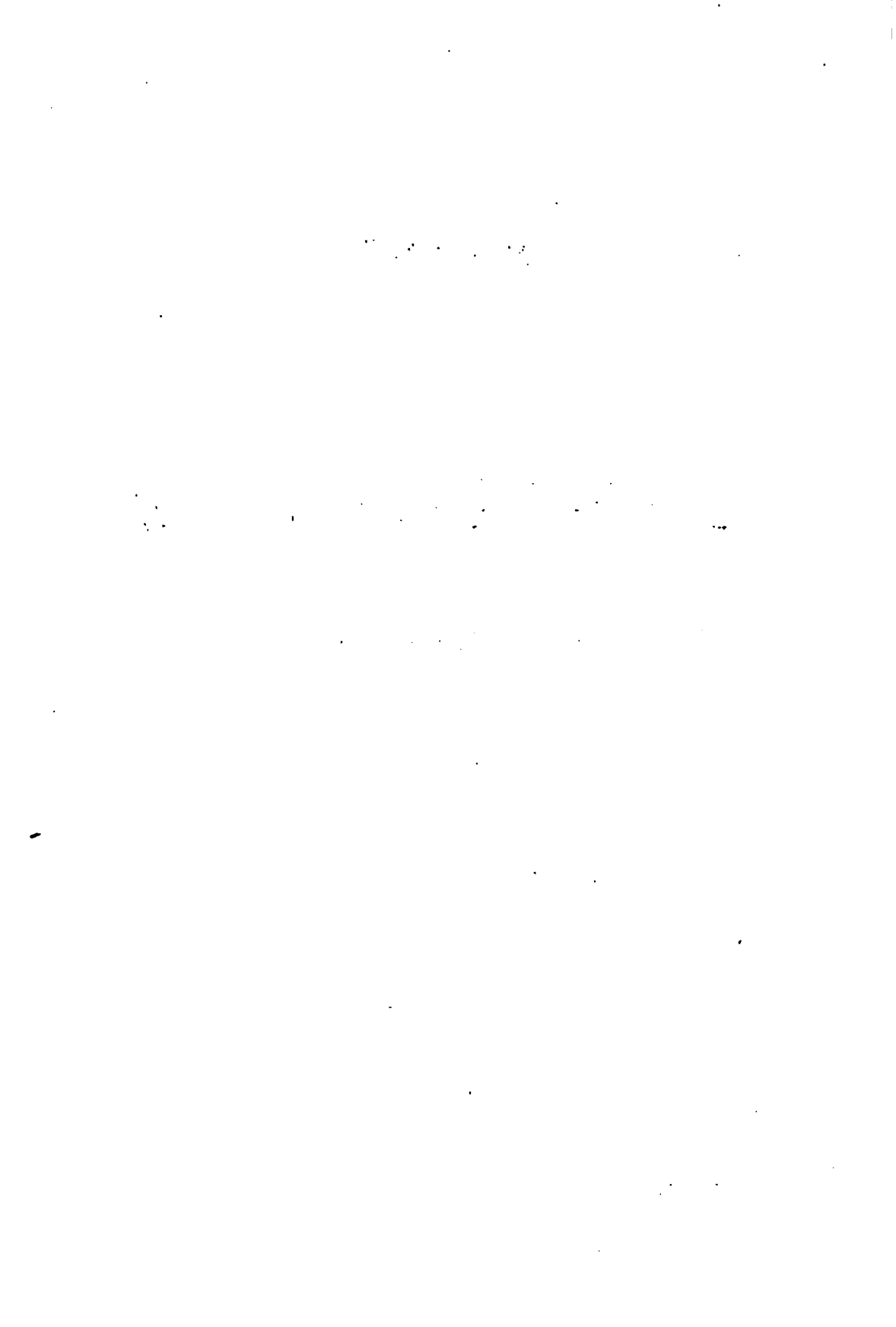
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J. G. POMERENE, Editor,

CLEVELAND, O.

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1878-79.





**\*INSTALLMENT SALES.**

I

[Cuyahoga Common Pleas, November Term, 1877.]

† NELLIE BALLOU v. E. FARNSWORTH ET. AL.

Breaking into premises to carry away property by one who has sold property to another to be paid for in installments, notwithstanding property is not fully paid for, constitutes a cause of action.

JONES, J.

Demurrer to petition on the ground that it does not state facts sufficient to constitute a cause of action.

The petition alleges, in brief, that the plaintiff purchased of the defendant a sewing machine at the price of \$80.00, paying in cash \$43.50, the balance to be paid in monthly installments of \$5.00 each until fully paid; that plaintiff paid on said machine the sum of \$92.50, which sum defendants received; and that in the month of September, 1877, the defendants, by their agents, forcibly and violently entered the premises of the plaintiff, and forcibly carried away said machine; wherefore she prays judgment against the defendants for the said \$92.50 as for money had and received.

*Held*, The petition contains no averment showing a right to recover back the money paid, yet the breaking into the premises by the defendants constitutes a cause of action even if they did not carry the machine away, or it had no value.

Demurrer overruled.

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**ATTACHMENT.**

[Cuyahoga Common Pleas, November Term, 1877.]

WITHAN v. HUBBELL, BROWN &amp; Co.

Demurrer will be sustained in a suit to recover for the wrongful attachment of goods, where the action is not on the bond, and no malice or want of probable cause is averred.

JONES, J.

This is a suit to recover for a wrongful attachment of the goods of the plaintiff, but it is not brought on the bond required by the law in such cases, and no malice or want of probable cause is any where averred. A demurrer is interposed by the defendants on the ground that it does not state facts sufficient to constitute a cause of action. A demurrer to the first petition filed in this case was heretofore sustained on the ground that there was no right of action in such cases other than on the bond or for a malicious proceeding. The amendments that have since been made are immaterial to the decision of the point, and the demurrer is again sustained.

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†See also 1 Cleve., 17.

**STATUTE OF FRAUDS.**

[Cuyahoga Common Pleas, November Term, 1877.]

**A. G. JONES v. MINERVA & WILLIAM McREYNOLDS.**

Where parties to a note, twenty days before its maturity, enter into a verbal contract for the retention of the money by the maker for a period of one year, the agreement is void for the reason it is within the statute of frauds.

**JONES, J.**

This is an action on a promissory note, dated July 7, 1876, for \$1,800, due one year after date, with interest, at eight per cent. payable semi-annually, and signed by both defendants. One defence was that, on the 15th of June, 1877, some twenty days before the note became due, the plaintiff and the defendants entered into a verbal contract for a good consideration, whereby the defendant was to retain the money for which the note was given, for the period of one year after the maturity of said note; that the defendant agreed to keep it and pay interest at the rate of eight per cent. per annum after July 7, 1877, as before. The plaintiff demurs to this defence and claims that the agreement was within that section of the statute of frauds which provides: "That no action shall be brought on any agreement that is not to be performed within one year, unless the agreement, or some memorandum thereof, shall be in writing and signed by the party to be charged," etc.

The court held the case to be within the statute of frauds and void for that reason, and the demurrer of the plaintiff to the defendant's answer was sustained.

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**BILLS AND NOTES.**

[Cuyahoga Common Pleas, November Term, 1877.]

**HANNA W. INGERSOLL v. WM. V. CRAW.**

A petition on notes alleging that a copy of which are attached to the petition, but not stating that all the credits are thereon given, is not demurrable.

**JONES, J.**

The petition sets forth two causes of action on two promissory notes for \$3,091.67 each, executed by the defendant and payable to the plaintiff, and says there is due the plaintiff on the note, (a copy of which is attached to and made part of the petition,) the sum of \$ —; also, that the interest has been fully paid to July 10, 1876. It does not state that all the credits are thereon given. The defendant demurs to the petition on the ground that it does not state facts sufficient to constitute a cause of action.

Demurrer overruled.

**\*STREET ASSESSMENT.**

2

ALLEN ET AL. V. CLEVELAND, ET AL.

[Cuyahoga Common Pleas, December 31, 1877.]

1. Where the mode and method of levying assessments, to pay the cost and expense of grading, draining, paving and improving a street, is prescribed by statute, an ordinance which seeks to prescribe the method of such assessment and which does not conform to the provisions of such statute will be held to be illegal and void.
2. When the board of improvements of a city seek to go outside of the line of improvement to pay for the same, it must first determine that a certain line of property should bear its proportion of the cost of the improvement, and such board is to exercise a judicial discretion.

McMATH, J.

This is a proceeding praying for an injunction restraining the collection of an assessment to pay the cost and expense of grading, paving and improving Broadway between certain termini.

The third section of the ordinance levying the assessment is as follows: "That the cost and expense of the said grading, draining, paving, and improving shall be estimated, levied and assessed upon all of the lots or parcels of land benefited thereby, excepting so much of the cost and expense of the said improvement as shall be chargeable to any street railroad company, as is by this ordinance provided; also excepting so much of said cost and expense as should be estimated and placed on the general tax duplicate of the city, as is by law in such cases provided."

This case comes within the provisions of either the 48th or 49th section of the municipal code. The first section of chapter 48 provides that where the city council of any municipal corporation shall appropriate any lots or lands for the purpose of laying off, opening, extending, straightening, or widening any street, alley or public highway, it shall have power to assess the cost and expense of such appropriation or improvement upon the lots or lands benefited thereby, including lots and lands that are contiguous and adjacent, as well as those that abut upon said street, alley or highway, or upon the general duplicate of the real and personal property subject to taxation within the limits of the corporation.

The power of the city council by that provision is restricted to assessing the cost and expense in one of two ways. It will be conceded that opening, widening and extending a street is not necessarily an improvement of the street under this code. It is in one sense, but it has been specifically provided for by the code. The case at bar presents a different question. The ordinance provides for an assessment to pay for grading, draining, paving and improving the street. The first section of chapter 49 is as follows: "When it shall be deemed necessary by any city or incorporated village to make any public improvement, not otherwise specifically provided for, it shall be the duty of the city council to declare, by

resolution, the necessity of such improvement and to publish such resolution for not less than two nor more than four consecutive weeks, in some newspaper published and of general circulation in the corporation." The city council in this case complied with that provision.

Section 576 is as follows: "For the payment of the cost of making said improvements \* \* \* the council may by ordinance, levy and assess a tax on all the lots or lands bounding or abutting on the proposed improvement \* \* \* to be assessed either in proportion to the front of the lots or lands so bounding or abutting, or according to the value of such lots or lands as assessed for taxation under the general law of the state, as may be equitable, and as the council may in each case determine." The action of the city council under this section is of a judicial character. It must determine under this section that it would be equitable and just that the lands bounding or abutting shall pay to the extent of 25 per cent. of the cost.

If this was a proceeding to open, widen and extend a street, the court would be forced to hold the third section of the ordinance legal. But in the case at bar a different rule is laid down by the statute. Section 576 expressly provides in what manner the assessment shall be made. The court, therefore, holds the third section of the ordinance in question to be illegal and void.

In one of these proceedings before the court there was a departure from the line of improvement, the board of improvements designating certain outlying property to bear a proportion of the cost of the improvement—property nonabutting. The board of improvements in a given case may do this, but in assessing the cost for opening, widening and extending a street the city council is limited by the benefits.

When the board of improvements seeks to go outside of the line of improvement to pay for a certain improvement, it must determine first, that it would be equitable that a certain line of property should bear its proportion of the cost of the improvement. The board is to exercise a judicial discretion. It is not the opinion of the five men composing the board, but it is the opinion of the board of improvements.

But in this case, when the five members of the board of improvements go through the city seeking property that is benefited and make up a judgment on that subject, that is the individual opinion of five men. Their action must be by a resolution—a declaration in writing, expressing the determinate opinion of the board of improvements. The property must be designated. When they go out they must determine, first, what property designated is accommodated by the improvement; second, what property is benefited by the improvement—a rule altogether different from the rule laid down as to benefits for opening, widening and extending a street. The board of improvement is to be governed by a uniform rule. It must be governed by a rule that includes accom-

modation and benefits; and within a certain radius. They cannot assess one-half on the line of the improvement and one-half on outlying property.

Now, in this case, the city council or board of improvements designated a large amount of property. Has there been a judicial determination by this board that it would be equitable that that outlying property should bear its proportion of the cost of this improvement? A majority of the board—three members—appoint a committee to go out and see the outlying property upon which they could impose a portion of this assessment. A report was made to the board and by it confirmed. We are told that that is a judicial determination of the question. But the statute requires them to determine that it would be equitable to assess a portion of the cost upon outlying property specially accommodated thereby. In this case neither the board of improvements nor the city council determined that question. Inasmuch as they have not done that which the law specifically requires them to do, no subsequent act of the board or council, or either of them, assessing, would be legal. They are trespassers, attempting to do that for which they have no authority in law. Therefore, the confirmation of this report goes for naught.

The preliminary injunction is granted.

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### \*JUDICIAL SALES.

6

[Cuyahoga Common Pleas, November Term, 1877.]

WHITE, COMMISSIONER, v. RAYMOND ET AL.

In an action to recover the price bid by a purchaser at a master's sale, the buyer cannot set up frauds practiced by co-lienholders, by which he was induced to bid more than the property was worth, after sale has been confirmed and no effort was made to have the court set aside the sale or refuse its confirmation.

JONES, J.

Suit to recover the amount of \$3,310, bid by defendants for certain lands sold by the plaintiff at master's sale in 1874. The plaintiff sets forth all the decrees, orders of court and preliminary proceedings to show that the sale was regular and prays for judgment. Defendants set up various matters by way of defence—frauds practiced by their co-lienholders by which they were induced to bid more than the property was worth, etc. The court held the defences unavailable in an action of this sort; that if they had any defence they should have applied to the court to set aside sale or to refuse its confirmation, and they could not stand by and see the sale confirmed and then come in and defend by setting up matters that they could have used to prevent the confirmation of the sale.

## 9

**\*APPEALS.**

[Cuyahoga Common Pleas, November Term, 1877.]

**BOTTEN v. ROLO, GUARDIAN.**

A guardian has no authority to appeal a case from a justice court to the common pleas, without giving the bond required in the justice act.

JONES, J.

In this case a judgment was rendered against the defendant before a justice of the peace. The defendant, as guardian of the minor sued, filed his transcript in this court for an appeal, but gave no bond in the court below, and a motion is made to dismiss the appeal for that reason. Section 519 of the code provides for a bond in error cases. S. & C., 1185; section 607 provides that executors and guardians who have given bonds are not required to give the undertaking required in section 516. Section 691, providing for appeals from the common pleas to the district court, contains the provision, "that in no case shall the administrators, executors, or guardians who have given bond in this state, with sureties, according to law, be compelled to enter into an undertaking in order to be entitled to a second trial, as above provided." S. & C., page 612, provides that every executor or administrator who may have given bond in this state, may appeal without filing appeal bond. S. & C., 1167, in the act regulating appeals to the district court, has this provision: "Provided, that in no case shall administrators, executors and guardians who may have given bond in this state \* \* be compelled to give bond \* \* to perfect an appeal, as is above provided."

S. & C., 1218: "The act regulating the jurisdiction of probate courts, and regulating appeals from the probate to the common pleas court, provides that no bond shall be required for appeal, as herein provided, from any executor or administrator who has given bond as such in this state."

The justice act provides that the party appealing an action from the justice to the common pleas court shall give bond; and there are no exceptions as to guardians, executors or administrators. And the court holds that the guardian in this case had no authority to appeal such a case from the justice to the common pleas court without giving bond as required in the justice act, and the motion to dismiss the appeal is sustained.

**ASSIGNMENT FOR CREDITORS—EXEMPTIONS.**

[Cuyahoga Common Pleas, November Term, 1877.]

**HALL v. BROWN, ASSIGNEE, ET AL.**

1. Where a chattel mortgage has been set aside as fraudulent and an assignee appointed, the refusal of the assignee to set apart part of the property in lieu of a homestead is a breach of his official bond.
2. Where the property from which the exemption is claimed is a quantity of brick, it is sufficient to select \$500 worth of brick without picking out the particular brick or portion of the pile.

JONES, J.

The plaintiff says in his petition that a chattel mortgage which he had made on three thousand brick was set aside and declared void, at the instance of one William Chapman, on the ground that it was fraudulent and void as to the creditors of plaintiff; that in that action he set up that he was entitled to select five hundred dollars' worth of those bricks as exempt, under the laws of Ohio; that afterwards, on the 26th of October, 1876, the probate court, upon the application of one of his creditors, appointed the defendant, S. S. Brown, his assignee, under the statute, for the benefit of creditors; that on the 7th of November, 1876, he gave a bond, with the two other defendants as sureties, for the faithful fulfillment of the duties of his office; that Brown took possession of all of said brick and counted them to his own use; that before any sale by him of said brick plaintiff demanded \$500 worth of said brick to be set off to him. Plaintiff says that at the time of such demand he was not the owner of a homestead; was a resident of Ohio and the head of a family, and entitled to select \$500 worth of brick in lieu of a homestead; that Brown, knowing these facts, refused to set him off the \$500 worth of brick, or any part thereof; and the plaintiff claims that thereby the bond, which said Brown gave with the other defendants, has been broken, and that he is entitled to receive \$500 and interest from the defendants, as the makers of said bond. To this petition Brown files a demurrer, and the sureties also file a demurrer in their own behalf, Brown contending that there was no proper selection of the bricks ever made by plaintiff.

The court holds that when the property is of this character it is sufficient to select \$500 out of it, without picking out the particular brick or portion of the pile of brick to be selected from. The sureties insist that if all that is alleged as to Brown is true, that it constitutes no breach of the bond given by them for the faithful performance of his duties.

In the 4th O. S. a case is to be found which holds that it is a breach of a constable's bond for the faithful performance of his duty, if, while holding an execution against A. he levies on and sells property belonging to B., and that the sureties in such a case are liable. We think the case at bar is a stronger case than that, and that the acts complained of on the part of Brown constituted a breach of the bond given for the faithful performance of his duties. The demurrers are overruled.

### SALE OF LANDS—DECEIT—PLEADING.

[Cuyahoga Common Pleas, January Term, 1878.]

MARION E. KETCHUM v. WM. R. PHILLIPS.

1. Statements made by a seller to induce a buyer to enter into a contract, that lots were worth \$25 per foot, but he would sell them at \$13, which was much less than the price at which other lots had been sold by him, is not an expression of opinion as to the value of the property, but an averment of fact, and if false, are a defense to an action for the purchase money.

2. In an action upon a land contract for the recovery of installments that are due, it is defense that at the time of making the contract, the seller was not the owner of the premises in fee simple.
3. It is competent to refer to statements of fact contained in another court, so as to make them a part of the defense in which they are referred to, in order to avoid repetition, but a reference to such facts as "for the reasons hereinafter stated" does not contain conclusion of fact.
4. An averment in a third defense by reason of the fraud and covin aforesaid practiced on this defendant, defendant is entitled to etc., is a sufficient incorporation into such defense of the prior allegations of fraud.

PRENTISS, J.

The petition states that the plaintiff is the owner in fee of the premises which were contracted by him to be sold to the defendant, and copies of the contract are attached. It appears from the contracts that payments for the land was to be made by the defendant in installments, with interest thereon, from the date of the contract, payable annually. Some of these installments have been paid; the last one not yet due. The action is brought to recover the amount of the installments that are due, and the annual interest thereon, the principal of which is not due. The plaintiff also asks for a sale of the lands to satisfy the indebtedness. Several defences are set up, and to each of these defences there is a separate demurrer.

The first defence is a denial of the averment of the petition that the plaintiff is the owner in fee of the lands contracted to be sold by him to the defendant. The defendant in the same defence denies that there is any amount whatever due, or to become due, on said land contracts, or any of them, and says that the "said land contracts are void and of no effect, for reasons which are hereinafter stated in defence No. 2."

The question arising on the demurrer to this defence is, whether, so far as it denies the averment in the petition that the plaintiff was at the time of the making of these contracts the owner in fee of the premises sold, it is a good defence to the recovery of the installments which have become due. In my judgment, it is no defence whatever, for the simple reason that these are independent agreements, and the right of the plaintiff to recover upon the agreements upon which a recovery is sought does not depend at all upon the fact whether, at the time of the making  
10 of the contracts, he could, or could not, make\* a good and sufficient deed of the premises to the defendant. He might be able to make just such a deed as the contract required at the time provided by the contract.

The remaining question is, whether or not the matters of fact contained in defence No. 2 are incorporated into defence No. 1, so as to make those statements a part of defence No. 1. If they are, then it may be that defence No. 1 is a good defence to the action. The statements in defence No. 2 are referred to in this way, if they are referred to at all. The defendant says that he denies there is anything due on the contract, because the land contracts,



each of them, are void and of no effect, for the reasons hereinafter stated in defence No. 2. That is not an incorporation of any statements of facts contained in defence No. 1. It simply refers to certain supposed reasons, which are set forth in defence No. 2, why the contracts were void. It does not refer to the statement of facts contained in defence No. 2 and make that statement a part of defence No. 1. It is perfectly competent, I have no sort of doubt, for a party, under the rules of pleading as they now exist—as it was competent under the common law rules of pleading—to so refer to statements of facts contained in another count of the declaration or in the plea to the action as to make them a part of the defence in which they are thus referred to, and the object of so doing is to avoid an unnecessary repetition of the facts and to save expense. It might have been done at common law, and still may be done under our system of pleading. The difficulty in this case is that there is no reference to any statement of facts contained in defence No. 2; it says only that the contracts are void for the reasons which are stated in defence No. 2. The averment that the contracts are void is an averment of a simple conclusion of law and not an averment of a conclusion of fact. There should be an averment of the facts upon which the conclusion of law is based. The demurrer to this defence should be sustained.

The second defence states that the plaintiff ought not to have and maintain his action against defendant, because plaintiff induced defendant to enter into the land contracts by fraud; that plaintiff represented to defendant that sub-lots Nos. 2, — and —, described in the land contract, were worth and valued at twenty dollars per foot, and that she had sold the other sub-lots of said allotment for that price per foot, and would not sell the remaining unsold sub-lots of the same allotment for a less amount, and then falsely represented that said sub-lots were worth twenty-five dollars per foot, and that the defendant could easily obtain that sum for said sub-lots, as inducements to defendant to buy said sub-lots, but that she would sell said sub-lots to defendant at thirteen dollars per foot which was much less than she had sold any other of said sub-lots of said allotment. Thereupon this defendant, relying upon said representations and statements, signed said land contract and made payments thereon as alleged. The defendant avers that the said sub-lots were not worth the value of twenty-five dollars per foot, as represented by plaintiff to defendant; that plaintiff has sold a number of said sub lots for a less price than twenty dollars per foot, and that defendant could not obtain twenty-five dollars per foot for said sub-lots; that plaintiff had sold a large number of the sub-lots of said allotment for a price less than thirteen dollars per foot—viz: twelve dollars; all of which the plaintiff well knew when she falsely and knowingly made said representations and statements to induce defendant to buy said sub-lots and to sign the land contracts aforesaid; and then goes on to say he has paid more than they were worth.

The question is, whether these representations, being made for the purpose of inducing defendant to enter into that contract, and being wholly false, and known by plaintiff, at the time she made them, to be false, constitute a fraud on account of which this defendant cannot be compelled to perform the contract which he thus made under those circumstances with the plaintiff.

It is claimed that these representations are mere expressions of opinion on the part of the plaintiff in respect to the value of the property. If that were so, it is very clear there was no fraud in making the representations. I think these representations go altogether beyond an expression of opinion as to the value of the property. They state that the plaintiff represented that she had sold certain of these sub-lots at a certain price, and had sold none of the sub-lots at less than a certain other price, when in point of fact the plaintiff had not sold any of the sub-lots at the price represented, and had sold a great many sub-lots at a price less than the price she alleged she had sold any. It is not, then, an expression of opinion as to the value of the property, but it is an averment of matters of fact. The defendant alleges they were false and that plaintiff knew them to be false, and that they were made for the purpose of inducing defendant to enter into the contract, and defendant, relying on the truth of those statements of matters of fact, was induced by her to enter into this contract.

I find a case reported in the XXXth New York Reports, which it seems to me, is exactly parallel with this case. In that case there was a contract for the sale of a crop of hops. The purchaser, to induce the seller to sell to him the hops, represented that he had purchased hops at a certain price of a certain person. That representation was false and was relied upon by the seller, and he, in consequence, made the sale, and the court of appeals of New York held that that was a fraud which avoided the contract, and the purchaser could not enforce the contract against the seller.

That case, it seems to me, is decisive of the question which is made upon this demurrer to this defence.

There is a further defence, to which there is a demurrer. Defendant, for a further and third defence to the cause of action set forth in plaintiff's petition, by way of counter claim, says, "by reason of the fraud and covin aforesaid practiced on this defendant, defendant is entitled to," etc. I think that is a sufficient incorporation of the statement in respect to the fraud and covin set forth in the second defence, to make it a part of the third defence.

The demurrer is sustained as to the first defence, and overruled as to the second and third.

**\*SERVICE OF SUMMONS.**

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[Cuyahoga Common Pleas, January Term, 1878.]

**JOHN HICKS V. THE M. E. CHURCH ET AL.**

Service by leaving a copy of summons at the church, the defendant being an unincorporated association formed for the purpose of religious instruction, is not a proper service under the statute.

PRENTISS, J.

This case is submitted to the court upon a motion to set aside the service of a summons.

The original petition in this case stated that this defendant was a corporation. After the filing of that petition the defendant appeared in the case and moved that the petition in certain particulars, should be made more definite and certain. That motion, in part, was granted, and in part was overruled by the court. Subsequently three persons, who name themselves trustees of this institution, filed an answer denying that there was any such corporation, and stated that they were not trustees of any such corporation. Upon this being done, the plaintiff, probably satisfied with the truth of the answer, took leave and amended his petition, stating that this defendant was not a corporation but an unincorporated association of persons formed for the purpose of doing business and holding property in the state of Ohio, and procured to be issued, upon the filing of this amended petition, a summons. That summons was served by the sheriff of this county, leaving a copy in the church building, which was erected by this alleged unincorporated association, and the motion is to set aside the service of that summons. The question is whether that is such a service as the law contemplates in cases of this character. In support of the motion affidavits are filed. One of the persons who makes affidavit alleges himself to be a trustee of this association, and that it is a religious association, and not formed at all for the purpose of holding property or doing business in the state of Ohio. There are, however, affidavits on the part of the plaintiff, which state substantially that the defendant is a corporation formed for the purpose of holding property in the state of Ohio. If we were to determine this question merely upon the statements of these affidavits, inasmuch as the affidavits on the part of the plaintiff are more numerous than those on the part of the defendant, we should, perhaps, have to overrule this motion; but I am satisfied, beyond all question, that this corporation is simply and purely a religious organization or association, and not at all formed with any design or purpose of doing any business, or of holding any property in the state of Ohio, except as the holding of property might be incidental to the main purpose and object of the association. You can find no association scarcely which is formed for benevolent, chari-

table, educational, literary or religious purposes, which does not, as incident to this purpose, hold property. The question is, what was the principal purpose and object of the formation of this association. Not what as incidental to its principal purpose and object it might be. Our statute provides that any company or association of persons, formed for the purpose of carrying on business, or for the purpose of holding any species of property within the state of Ohio, and not incorporated as such, may sue or be sued in any of the courts of this state by such usual or ordinary name as such company, partnership may have assumed to itself or be known by. It further provides that process against such company or firm under the provisions of this act, shall be served by leaving a copy at the usual place of doing business within the county. Now, this process was served by leaving a copy at the church. It does not appear from the return of the officer that the church was the usual place of doing business by this association in this county. What was the purpose of this erection upon the land which was owned by this unincorporated association—of the church then? It was not for doing any business there—simply for the purpose of holding religious services there. It was not its place of doing business in any proper sense of that term; but it was the place at which it carried out its principal object—the imparting of religious instruction to those who might attend for the purpose of receiving such instruction.

Now, if the service could be made in this manner upon this unincorporated association, there is not an unincorporated association in the state of Ohio but which might be sued by its name under the provisions of this statute, and service made in a manner similar to that in which it was made in this case. The legislature might have provided that *all* associations, of every name, character and description, no matter for what purpose formed, might be sued by the name which they assume to themselves, and service might be made upon them by leaving a copy of the summons at the place which they use for any of the purposes for which they associate themselves together. It is clear to my mind that the defendant in this case is an unincorporated association formed for religious purposes only, and I think the service should be set aside. That, however, does not dispose of the case at all. There is no difficulty, in my judgment, in putting this case in such shape that service can be made upon the parties who are the debtor, and judgment rendered upon the claim of the plaintiff if the plaintiff has any claim.

Hudson for plaintiff; Pennewell & Lamson for defendants.

**HUSBAND AND WIFE.**

[Cuyahoga Common Pleas, January Term, 1878.]

†W. A. FISHER ET AL. v. MORTIMER MCMAHON ET AL.

1. An undertaking on the part of the wife to charge her separate property with the payment of a debt need not be in writing.
2. If it was in writing there is no law making it necessary to attach it to the petition.

PRENTISS, J.

The action is brought upon an account for goods sold and delivered. The defendants are alleged to be husband and wife, who are together carrying on the grocery business. The petition alleges that Ellen McMahon, the wife, had some separate property, real estate, which she undertook and intended to contract to charge with the payment of this debt. The plaintiff asks for a personal judgment against both of the defendants, and for an order making the amount of the debt chargeable on this real estate belonging to the wife, it being described in the petition. The motion asks that the plaintiff be required to state whether the alleged promise, on the part of the wife, to make her separate property liable for the payment of the claim, was verbal or in writing, and if in writing that a copy be attached to the petition.

It is of no consequence whether the contract alleged was a verbal or written one. If it was either verbal or written it would alike prove the averments of the petition, and entitle the plaintiffs to have their claim made a charge upon her separate property. If it was in writing it could not be required to be attached, because there is no law making it necessary.

The motion is overruled.

Stone &amp; Hessenmueller for plaintiffs; Lavan for motion.

**CREDITOR'S BILL.**

[Cuyahoga Common Pleas, January Term, 1872.]

W. H. AYLORD v. MARTIN KIPP ET AL.

Petition to subject land to a lien under section 489 of code, need not aver that "said judgment was not appealed or stayed."

PRENTISS, J.

The petition seems to subject land under a judgment of a justice of the peace, filed upon the lien docket of the court of common pleas, pursuant to section 489 of code 2, S. & C., 1093. Demurrer filed on the ground that "said judgment was not appealed or stayed." By the court: PRENTISS, J. Said averment is a matter of defense and not a condition precedent in the right of recover.

Bentley for plaintiff; Willson &amp; Sykora for defendant.

†See also 1. Clev., 22.

**\*JUDICIAL SALES.**

[Cuyahoga Common Pleas, January Term, 1878.]

**KOTCH, GOLDSMITH, JOSEPH & CO. V. SIEPLEIN ET AL***Motion to set aside master's sale because of incorrect metes and bounds in advertisement.*

This was a case where the advertisement correctly gave the lot number, the map, plat and subdivision, but incorrectly described the lot by metes and bounds. A motion to set aside the sale by the debtor, with no affidavits, was overruled for the reason:

1. There was no difficulty in ascertaining the land to be sold from the description as correctly given, nor in ascertaining from the advertisement itself that the boundaries were correctly stated.

2. No evidence in the case to show any injury resulted to the maker of the motion from the incorrect statement of the advertisement.

Stone & Hessenmueller for plaintiff, C. W. Coates for defendant.

**PLEADING—PRACTICE.**

[Cuyahoga Common Pleas, January Term, 1878.]

**†NELLIE BALLOU V. E. FARNSWORTH ET AL.**

1. A petition on appeal from a justice which states a different cause of action from that before the justice, on motion should be struck from the files, but with leave to file another petition.
2. Consent of parties cannot give the court of common pleas jurisdiction of a cause of which it has only appellate jurisdiction.
3. A demurrer in such a case, instead of a motion to strike from the files, is not an appearance giving jurisdiction, and does not prevent a motion to strike petition from files.

**PRENTISS, J.**

This is somewhat of a peculiar case. An action was commenced by the plaintiff against the defendants before a justice of the peace. A bill of particulars was filed stating the plaintiff's claim to be seventy-four dollars for money had and received by the defendants from the plaintiff. A trial was had before the justice of the peace and a judgment was rendered in favor of the defendants. From that judgment the plaintiff appealed, and the appeal was entered in his court. The plaintiff filed a petition, stating these facts: That the plaintiff bought of the defendants a sewing machine at the agreed price of \$80; that she paid \$92.50 to the defendants on account of that machine. It does not state whether or not it was the full amount of the debt at the time these payments were made; but it was in excess of the price

†See also 1 Clev., 1.

agreed upon to be paid, and probably was the full amount which was then due. It states that after these payments were made the defendants forcibly and violently, thro' their agents and servants entered upon the premises of the plaintiff and seized and carried away this machine and converted it to their own use; that the plaintiff afterwards demanded from the defendants this \$92.50, which they refused to pay, and she asks a judgment against defendants for \$92.50 as for money had and received. To that petition there was a demurrer by the defendants. That demurrer was overruled, upon the ground that there was stated in this petition a good cause of action in tort against the defendants. The court, in giving the opinion in that case, was made by the reporter to say that the cause of action stated in the petition which the court held to be good was a cause of action growing out of the trespass committed by the defendants upon the realty of the plaintiff and made to say also that there was no cause of action stated in the petition against the defendants for money had and received. Judge Jones, who gave the decision in that case, says that the reporter misapprehended him in one particular. He says he did not undertake to state and did not state, as the ground of his decision, that there was a cause of action stated in this petition for the trespass upon the realty of the plaintiff, but did state that there was stated in this petition a cause of action founded upon the tort or torts alleged in the petition. That demurrer being sustained the defendants then filed a motion to dismiss the petition, alleging as a ground for that motion that this court has no jurisdiction of the cause of action stated in the petition. That motion, as I understand it, is not a motion to dismiss the action, but substantially to strike the petition from the files upon the ground as stated, that of the cause of action stated in the petition, this court has no jurisdiction. It is immaterial what ground is alleged in the motion, if any ground exists, to justify or require the court to strike the petition from the files.

The cause of action, which was asserted before the justice of the peace, was a cause of action of which that justice had exclusive jurisdiction under the provisions of our statute.

This court, by the appeal of the case which was commenced before the justice acquired jurisdiction of that case, and by the appeal acquired no jurisdiction whatever of the case which is made in the petition. It is claimed here, or may be claimed, perhaps, that the action of the parties, especially of the defendants in this case in this court, has been of that character which gives to this court jurisdiction of the cause of action stated in the petition, that action being the filing of the demurrer to the petition.

If this court has jurisdiction of the cause of action stated in the petition, the petition ought not to be stricken from the files. The important inquiry then is whether the court has acquired jurisdiction of that cause of action.

Now, parties cannot, by consent give \*jurisdiction to the court of common pleas of a case of which the court of common

pleas has no original jurisdiction, but has only appellate jurisdiction. Inasmuch as the cause of action asserted in this petition is a cause of action of which the justice had exclusive jurisdiction, and of which the court of common pleas has no original jurisdiction, the action of the defendants in demurring to the petition did not give this court jurisdiction.

It is true in a case reported in the 28 O. S. reports, Judge Wright, in giving the opinion in that case, says that it is well settled law in this state that the court of common pleas may acquire jurisdiction of a case of which a justice of the peace alone had exclusive jurisdiction by consent of the parties, and he referred to several cases previously decided by the supreme court of this state for the purpose of sustaining that opinion thus expressed by him. Those cases do not sustain that opinion thus stated by him—not one of them. The case in which he gave that opinion was a case of a different character from that of a case of which a justice of the peace has exclusive jurisdiction. I think there is some error in the report of that case. I think what Judge Wright meant to say and what he did say, was that the consent of the parties might give to the court of common pleas jurisdiction in any case of which the court of common pleas has original jurisdiction. That would be in precise conformity to the decisions to which he refers to sustain the position which he states.

Parties cannot by consent give to the court of common pleas jurisdiction in a case of which the court of common pleas has not original jurisdiction, but they may, by consent, give to the court of common pleas jurisdiction where the case comes into the court of common pleas by appeal in a case of which the court of common pleas has original jurisdiction.

Now, the court of common pleas, in this case, did not have original jurisdiction of the claim asserted in this petition, the claim being only for the sum of ninety-two dollars and fifty cents. Then the action of these defendants in demurring to the petition did not give the court of common pleas jurisdiction of the claim made in the petition. This court, inasmuch as the petition does not assert the cause of action which was asserted by the plaintiff in the justice court, and from the decision upon which the appeal was taken, has no sort of jurisdiction of it. Entertaining these views, I think the motion to strike this petition from the files should prevail, but the plaintiff may have leave, if she desires it, to file a petition setting forth the claim which was asserted before the justice of the peace.

Mr. McFarland: On paying all the costs which have accrued from the filing of the petition.

The Court: Yes, of course.

Mr. McFarland: I want this to be part of the decision.



## CONTRACTS.

[Cuyahoga Common Pleas, January Term, 1878.]

H. T. WISNER V. FREDERICK ENGEL.

An agreement by B to credit the amount of A's account for labor and materials on notes which B held against A, upon B's refusal to comply, gives A a right of action for a money demand.

PRENTISS, J.

The petition of the plaintiff states that there is due to him on an account, a copy of which is attached to the petition, a certain sum of money. He further says, however, in his petition, it was understood and agreed between the plaintiff and the defendant, that after the accruing of that account the defendant would credit or apply in payment that account upon certain notes which he held against this plaintiff. It states that after this account accrued the plaintiff applied to the defendant to make an application of this account upon those notes, or pay him the amount of this account, and he refused to do either; and he asks judgment for the amount of that account.

To this there is a demurrer interposed by the defendant upon the ground that this account was a payment so far as it went of those notes; and, therefore, the amount of this account should not be recovered by this plaintiff of this defendant.

That is not the view that I take of this case. I think the petition shows this substantially: That this plaintiff performed a certain work, furnished certain materials to this defendant upon the agreement on the part of this defendant that he would apply the amount of that work upon certain notes which he had against this plaintiff; and he has refused to make that application.

Now, there was no payment, it seems to me, under the facts stated in this petition of this indebtedness growing out of this work and this material on the part of the defendant to the plaintiff. The whole sum and substance of it is this: That a debt accrued in favor of this plaintiff against this defendant for this work and this material, and the plaintiff agreed to pay this defendant this debt by applying this work and this material upon the debt which he had against the plaintiff. He would not do it, and after he positively refused to pay this debt, the plaintiff, according to the terms of the agreement, brings this action to recover the amount.

I cannot distinguish this case, at all, from an agreement on the part of a party to pay in specific articles a debt which was contracted payable in those articles. As if a man should hire a man to do certain work for him and agree to pay him in a horse that had a specific price; and after the work was done the creditor should apply to the debtor for the payment in the mode provided

by the contract, and the debtor should refuse to pay him, the creditor might maintain an action for the work and labor done.

I think this plaintiff might bring an action to recover for this work and this material, they not having been paid as the defendant agreed he would pay the plaintiff for them.

The demurrer is overruled.

Stone & Hessenmueller for plaintiff; W. S. Kerruish for defendant.

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### NEW TRIAL.

[Cuyahoga Common Pleas, January Term, 1878.]

GORDON ET AL. V. COWLE ET AL.

Judgment by default against a defendant, where defense was omitted by reason of forgetfulness of his attorney, will not be set aside, in absence of showing that the party had no adequate remedy against his attorney.

JONES, J.

The petition in this case sets forth that at the September term of this court, 1877, the defendants recovered a judgment against the plaintiffs for over \$500 by default, and asks that this judgment be vacated and set aside, and the plaintiffs in this action (defendants in the first) be allowed to answer. The grounds for vacating are as follows:

That the plaintiff, on receiving their summons in the first action, took the same to their regular attorney, a member of this bar, and employed him to defend the case, informing him of their defense; that the attorney agreed to do so and accepted the retainer; that the plaintiffs took no further steps in the matter until after the term ended, when they found that their attorney had forgotten the case and allowed judgment to be taken by default. The petition also states that the plaintiffs (defendants in the first action), had a good defense, which is set forth in due form.

To this petition to vacate a demurrer is interposed on the ground that the petition does not state facts sufficient to constitute a cause of action or ground of relief, and the simple question to be determined is whether the negligence of counsel under such circumstances is a sufficient ground for vacating the judgment, and we hold that it is not in the absence of any showing that the party has not his adequate remedy against his attorney.

Ingersoll & Williamson, attorneys for plaintiffs; Brewer & Wilcox, attorneys for defendants.

**CRIMINAL LAW.**

[Cuyahoga Common Pleas, January Term, 1878.]

**STATE OF OHIO V. JAMES M. DUGAN.**

After the closing argument had begun, the state was not allowed to call a witness to rebut proof of an *alibi*.

In this case, during the argument and while the prosecuting attorney was making the closing arguments for the state, a witness came into court, accidentally, and would have testified to the identity of the prisoner, and that he was in Cleveland about the time of the alleged burglary—the defense being an *alibi*. A motion to open the case and swear the witness to let in this material testimony for the state, by McMath, J., was overruled.

J. C. Hutchins, E. J. Blandin for the state; W. E. Preston for defendant.

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**HUSBAND AND WIFE.**

[Cuyahoga Common Pleas, January Term, 1878.]

† **W. A. FISHER ET AL. V. ELLEN MCMAHON.**

1. The separate property of the wife is liable for a bill of groceries, where she and her husband are carrying on the grocery business.
2. An action to charge the separate property of a married woman doing business with her husband, for a bill of goods sold to them, need not make him a co-defendant.

PRENTISS, J.

The petition in this case alleges that Ellen McMahon is the wife of one Mortimer McMahon, and that she and her husband were engaged in the business of selling groceries, and of carrying on the grocery business. That plaintiff sold them a large bill of groceries, and that Ellen McMahon then intended to charge her separate property (being real estate situate in Cleveland, Cuyahoga county, state of Ohio), with the payment of said purchase, and to make it a charge upon said property.

A demurrer is interposed to this petition on the ground:

1st. That the petition does not state facts sufficient to constitute a cause of action.

2d. Defect of party defendants.

We cannot see why the petition does not state facts sufficient to constitute a cause of action. And in respect to the claim that there is a defect of party defendants, we refer to the 28th section of the code or amended laws of 1874, vol. 71, pages 47 and 48, which, under certain restrictions and circumstances, explicitly allows an action to be brought and a judgment rendered against a married

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† See also 1 Clev., 14.

woman without joining her husband. Now, the object and purpose of the plaintiff is to effect what this act contemplates may be done. And it is not necessary for her husband to be joined with her; the action can be maintained against her, and her alone, and a judgment can be recovered against her. The two late decisions of the supreme court have construed this statute, and those decisions go to show that in all cases where it appears that there is a separate property of the wife, and it was understood at the time of the purchase and sale that this, her separate property was to be chargeable with the debt, a proceeding of this character is allowable and proper

The demurrer is overruled.

Stone & Hessenmueller for plaintiff; Lavan for defendant.

### BILLS AND NOTES.

[Cuyahoga Common Pleas, November Term, 1877.]

† SHERWIN, WILLIAMS & CO. V. BRIGHAM.

1. If a draft which D. H. B. authorizes C. A. B. to draw on him for the latter's accommodation for discount at a particular bank, is drawn and endorsed directly to S. W. & Co., after refusal by the bank to discount, it is a misappropriation of the same, and D. H. B. is not liable.
2. If C. A. B., after such authority becomes insolvent before drawing such draft, but does draw after his insolvency, and endorses the same to S. W. & Co. who knew of the insolvency, in such case the promise of D. H. B. to accept is not binding.

JONES, J

The petition in this case avers that on the 13th of August, 1875, one C. A. Brigham executed his note payable to plaintiffs' for \$505.50; that on the 15th day of September, he executed a note to the order of plaintiffs, for the sum of \$1,500; that plaintiffs, solely for the accommodation of said C. A. Brigham, endorsed them and they were discounted for the benefit of C. A. Brigham by the Merchants' National Bank of Cleveland, and the proceeds received by him.

Plaintiffs further say that on or about the 20th of October, 1875, said C. A. Brigham became embarrassed in business and notified the defendant in this case, who is his brother, residing in Springfield, Mass., and that thereupon said defendant, D. H. Brigham, wrote and mailed to said C. A. Brigham, a letter which, among other things, said: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft, making it four months if they will; if not, three months, and we will honor it, one or two thousand dollar drafts, and trust it will make you easy. (Signed) D. H. Brigham." That

† Judgment affirmed by district court in opinion. 2 Clev., 228. and judgment of district court affirmed by supreme court, in opinion 39 O. S., 137.

the letters, "D. H. B. & Co.," meant and was understood by all the parties to mean D. H. Brigham & Co., of which D. A. Brigham was a member; that afterwards, on the 12th of November, 1875, the said C. A. Brigham exhibited to these plaintiffs the said letter, and also two drafts drawn by said C. A. Brigham on and to the said firm of D. H. Brigham & Co., at Springfield, Mass., dated November 12th and 15th, 1875, for one thousand dollars each, payable 90 days after date to the order of said C. A. Brigham, and by him indorsed to the plaintiffs, and thereupon he requested plaintiffs to take up and pay said two notes theretofore discounted as aforesaid, and to receive the said two drafts in consideration therefor from said C. A. Brigham, that these drafts were drawn on the longest time C. A. Brigham's bank would discount the same, and were given to the plaintiffs with the understanding that C. A. Brigham would pay a like bank discount on said drafts for 90 days; 23 that in consideration of the premises, and relying upon the promises of the defendant in said letter contained, they agreed to take up said two notes, and in consideration therefor, received and became the owners of said two drafts; that they did pay and did take up said two notes; that said drafts were immediately forwarded to said D. H. Brigham & Co. for acceptance, which was by them refused, and afterwards the same was forwarded for payment, and payment was also refused.

The petition also avers that at the time and before said drafts become due, said C. A. Brigham became utterly insolvent.

The defendants, D. H. Brigham, by his answer, denies that either of the drafts were delivered to plaintiffs on 12th of November, 1875, and says that in fact they were never shown to the plaintiff until the 16th of November, 1875.

The defendant further avers that on the 12th of November, 1875, said C. A. Brigham made his two drafts to D. H. Brigham & Co. for \$1,000 each, one dated November 12th, and the other dated November 15th, both payable 90 days after date to the order of C. A. Brigham, and by him indorsed to and left with John Whitelaw as cashier of the National City Bank, for the purpose of being discounted by said bank; that on the 15th of November, the said bank having refused to discount drafts, said C. A. Brigham then called at said bank and got said drafts, and he erased his indorsement thereon, then handed them to the plaintiffs and then informed them of the bank's refusal to discount, and plaintiff thereupon gave said C. A. Brigham a receipt dated November 15th, showing that they had received two drafts for \$1,000 each, to take up the two notes in question theretofore discounted as aforesaid. That on the 15th of November, plaintiffs handed said drafts back to said C. A. Brigham and requested him to make two new drafts on D. H. Brigham & Co. for the same amounts, payable at the same time and place of the others. That the said C. A. Brigham did do so and did destroy the drafts first made on the 16th of November, 1875, and that he then delivered the said two new drafts to plain-

tiffs, and that these last drafts are the same drafts sued on and named in plaintiff's petition.

The defendant then says that on the 16th of November, 1875, the said C. A. Brigham had made a general assignment for the benefit of his creditors, and that this fact was known to the plaintiffs before they received the last named two drafts on the 16th of November. The defendant also says that the drafts named in the petition were not made to be discounted at any bank, but solely to protect the plaintiffs against their indorsement on the two notes as named. The defendant denies that he promised or ever undertook to accept any drafts for any such purpose. He avers that the plaintiffs parted with nothing and incurred no new liability on account of the delivery of said drafts to them. Nor did the plaintiffs in any manner change their position as to said notes so indorsed on account of the delivery of said two drafts to them. He says there was no consideration whatever for his promise in said letter to accept said drafts.

To this answer of the defendant, the plaintiff interposes a demurrer on the ground that it does not state facts sufficient to constitute any defense to the plaintiff's claim.

In testing the sufficiency of the answer, we may, of course, look also to the averments contained in the petition in connection therewith. I have given the case careful attention and reflection, but will merely state one or two conclusions to which I have arrived without elaborately discussing the case. I hold:

1st. That the letter of D. H. Brigham, the defendant, agreeing to honor the drafts of his brother for his accommodation for one or two thousand dollars, shows that he only agreed to accept such draft as his brother's bank would discount. He says in his letter, "at such time as your bank will discount." Again he says: "Within four months if they will; if not, three months, and we will honor it."

2d. It appears by the answer that the first two drafts drawn here, on said D. H. Brigham, were actually presented to the said bank of the drawer, and discount was refused and that said plaintiffs had notice of this fact at the time they took the first two drafts.

3d. I think it follows that the delivery of these drafts to the plaintiffs, under these circumstances, was a misappropriation of them and that the defendant was under no obligation to accept the drafts even if the plaintiffs had discounted them in the usual way.

4th. But another difficulty is disclosed in the answer of the defendant. It says that on the 15th the said two drafts for one thousand each were handed back to said C. A. Brigham, and he was requested to make two others of the same date and amount, and time of payment in place of them, and that on the 16th of November he did hand them over, and that these two new drafts are the drafts mentioned in the plaintiff's petition, and that at that time C. A. Brigham had actually made an assignment for the bene-

fit of his creditors, and the same was known to plaintiffs on that day, before the two drafts last named were delivered to or accepted by them.

I think the plaintiffs cannot recover on account of the first two drafts, because they were never presented to, or payment refused thereon by said defendant or his firm; and they cannot recover on the last named drafts, because they were drawn on the defendant, who agreed to be an accommodation acceptor, after it was known to the plaintiffs that the drawer had actually failed, and when the circumstances of the drawer had so far changed that there was no reasonable probability that the drawer would accept the same. There are a number of other interesting questions in this case which I will not notice at present. The demurrer of the plaintiff to the answer of the defendant is overruled.

Ingersoll & Williams for plaintiffs; Prentiss & Vorce for defendant.

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**\*PROCEEDINGS IN AID OF EXECUTION—REFEREE—ATTACHMENT OF WITNESS, ETC.** 26

[Cuyahoga Common Pleas, January Term, 1878.]

† A. H. HARMAN V. HENRY WALLER, ET AL.

In a proceeding in aid of execution, before a referee, under the 459th section of the code, a witness is subpoenaed by the clerk of the court of common pleas to appear before the referee to testify, no order having been made by the court for the examination of witnesses, other than the judgment debtor, and the witness refuses to appear in obedience to the subpoena, *Held*,

1. That the referee in such proceeding can examine such witness only as may be ordered to appear before him by the court.
2. That the subpoena issued by the clerk of the court was not an order of the court, and the witness was not bound to obey the same, and therefore not liable to be attached as for a contempt.—[ED. LAW REPORTER.]

PRENTISS, J.

This was a proceeding in aid of execution. An order of reference was made to a master, and the master makes a report and asks the advice of this court as to what, under the circumstances of his report, is to be done. It is not a very proper shape in which to present the question to the court for action; yet as counsel on both sides seem desirous that the court should express some opinion upon the questions involved I am disposed to do so at this time.

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†The district court of Cuyahoga county dismissed a petition in error to reverse the ruling in this case, in opinion 2 Clev., 185. This opinion was followed in *Manning v. Manning*, 11 B. 144.

27 \*A motion was filed by the plaintiff asking for an order for an examination of the defendants, Henry Walter and Henry B. Meyer in aid of execution, and the plaintiff also filed an affidavit setting forth the recovery of a judgment, that the same was then in full force and unsatisfied, and the issue and return of an execution thereon unsatisfied. The court thereupon, those facts being found by the judge, made this order: "That this case be referred to R. J. Winters, who is hereby appointed referee herein, and that the said Henry Walter and Henry B. Meyer be and appear before the said referee at room 6, 121 Superior street, in the city of Cleveland, on the 26th day of December, 1877, at 9 o'clock, a. m., then and there upon oath, to make answer to all such questions as may be put to him. It is further ordered that the said R. J. Winters, at the time and place for that purpose above named, proceed to examine the said Henry Walter and Henry B. Meyer and such witnesses as may be ordered before him, and such examination and testimony of witnesses (if any) he report in writing, together with his finding of facts, to this court, without unnecessary delay."

In pursuance of the order made by the judge in this case, the referee proceeded to examine one of the judgment debtors, the other judgment debtor at the time being out of the county. After that examination ended, the plaintiff, desiring to examine other witnesses, procured the clerk of the court to issue a subpoena for those witnesses to appear before the referee. That subpoena was served upon those witnesses, or one of them, and that witness refused to appear to give testimony before the referee, and the referee wishes to ascertain what should be done either by him or the court in further proceedings under this order. It is claimed in the first place, that under this order no witnesses can be examined by the plaintiff in this proceeding. Section 459 of the code, contained in the chapter in relation to proceedings in aid of execution, provides, "when an execution against the property of a judgment debtor, or one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from a probate judge or a judge of the court of common pleas of the county to which an execution was issued, requiring such debtor to appear and answer concerning his property before such judge, or a referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued."

The next section provides: "After the issuing of an execution against property, and upon proof by the affidavit of the judgment creditor, or otherwise, to the satisfaction of the court of common pleas, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of



the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place in said county, to answer concerning the same. And such proceeding may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are prescribed in this chapter."

The next section provides for a case where by the affidavit of the party or otherwise, it appears to the satisfaction of the court that there is danger of the judgment debtor leaving the state or concealing himself to avoid the examination, the court or judge may issue a warrant requiring the sheriff to arrest him and bring him before such judge within the county in which he may be arrested; and such warrant can be issued by a judge of probate or a judge of the court of common pleas of the county in which such debtor resides or may be arrested. When brought before the judge he shall be examined on oath, and other witnesses may be examined on either side, and if on such examination it appears there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment, he may be ordered to enter into an undertaking in such sum as the judge may prescribe, with one or more sureties, that he will, from time to time, attend for examination before the judge or referee as shall be directed. If he fail to enter into that undertaking, then he may be ordered to the jail of the county. In this section (461) there is an express provision for the examination of *other witnesses* on either side.

It is claimed on the part of the witness who refused to appear in obedience to the subpoena, that inasmuch as this section provides for an examination of witnesses in proceedings in accordance with it, and as the previous sections read do not provide for an examination of witnesses that witnesses can only be examined in proceedings under this section. There is a further provision (section 465) as follows:

"Witnesses may be required upon the order of the judge, or by a subpoena issued by the clerk of the court of common pleas, to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue."

It is claimed here that this provision of the statute does not apply to proceedings under sections 459 and 460, which I have read, but only to other proceedings provided for in this chapter. It is said in the brief which has been made by counsel for this witness that construction of this section of the statute is sustained by the provisions of the New York code, the provisions of that code being substantially the provisions of our code, and that it was intended by the legislature when it adopted this code to adopt substantially the provisions of the New York code.

Now in my judgment, that claim is wholly erroneous. Instead of the provisions of the New York code giving countenance to that claim it gives countenance to the claim which is asserted

here on the part of the plaintiff. The New York code, in a single section, contains all that is contained in the three sections which I have read; in other words, our code-makers, when they made our code, instead of inserting in a single section the provisions of the 292d section of the New York code, divided them into three sections. The first part of section 292 of the New York code is the same exactly as the 459th section of our code. Immediately following in the New York code, is the provisions found in the 460th section of our code. Then follows this provision: "On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner, etc." Now, if that does not mean that witnesses may be examined in proceedings which conform to the proceedings authorized by sections 459 and 460 of our statute, I do not know what it does do. After containing the provisions contained in those two sections, immediately following it is this language: "On an examination under this section, either party may examine witnesses in his own behalf." It means then to say exactly what is said by our code in the 466th section, "witnesses may be required to appear and testify upon any proceeding under this chapter."

Now I have no doubt that witnesses may be examined in a proceeding under the 459th and 460th sections of this code. The order in this case was for the examination of such witnesses as may be *ordered* before the referee. By whom is this order for an examination to be made?

I think it clearly contemplates that the order for an examination of the witnesses is to be made by the judge or the court that issues the order. It is not for an examination of such witnesses as the parties may choose to bring before the referee, but the language is "such witnesses as may be ordered before him." Who is competent to give any order for an examination of witnesses? Not the referee. He has no authority of that kind vested in him. Not the party himself, because he has no judicial power. The court or the judge, and no other person has authority to make the order, and the order must be made, it seems to me, before any witnesses can be examined. I do not think it was intended to give to the party the privilege of bringing any and everybody that he may choose before the referee for examination, but he may apply to the court at any time while the proceedings are pending before the referee for an order for the examination of witnesses, and that order, it seems to me, should be specific—for an examination of such witnesses, naming them. But it said here that that construction is erroneous, for the reason that the statute has provided that witnesses may be required, upon the order of the judge or by a subpoena issued by the clerk of the court of common pleas, to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue. It is claimed that if a subpoena be issued by the clerk of the court of common pleas for a witness that that, in substance is an order of the court for the witness to appear; but

that subpoena is for the simple purpose of advising the party that his attendance is required before the referee for the purpose of giving his testimony in the case, and in my judgment it is not equivalent to an order made by the judge or by the court. It is simply a process by which a witness may be brought before that court.

I think then in the absence of any order made by the judge or by the court this witness was not bound to attend before the referee.

Now, can this witness be attached for contempt for disobedience to this subpoena? Under the provisions of the code certain civil actions may be referred to a referee, and such referee has the same power and authority that a court has to enforce the attendance of witnesses. This, however, is not a civil action, but is a special proceeding. The only provision which authorizes any proceeding for contempt is to be found in \*the 473d section of this chapter: "If any person, party or witness disobeys an order of the judge or referee duly served, such person, party or witness may be punished by the judge as for a contempt." Here is a disobedience of a subpoena issued by the clerk of the court for the purpose of bringing this witness before the referee. That subpoena was not issued in pursuance of any order of the court, and as there was no order made by the court of which there has been any disobedience by this witness, no proceedings can be had against this witness for a contempt.

Brewer & Wilcox for plaintiff; Henderson & Kline for witness

### FIXTURES—MARSHALING LIENS.

[Cuyahoga Common Pleas, January Term, 1878.]

#### AMASA STONE V. MORRIS ET AL.

1. A mortgage on real estate covers the boiler, engine and appliances attached and connected with them, used for the purpose of propelling machinery in a planing mill on the property, and no subsequent chattel mortgage can affect the original mortgage.
2. One who has a judgment lien upon the realty is entitled to have the personalty sold first by one who has a mortgage covering both realty and personalty.

PRENTISS, J.

Amasa Stone held a mortgage on the realty given to B. Seymour by William A. Morris and wife, which mortgage was assigned to Stone by Seymour, the property being a planing mill. Afterwards Morris gave to the plaintiff a chattel mortgage on the machinery to secure one note of about eight hundred dollars, and as additional security for the note first named in the real estate mortgage. Subsequently to this, Morris gave to Wm. Bingham, for himself and as trustee for other creditors of Morris, a mortgage for about eleven thousand dollars on the real estate, which was in

form of a real estate mortgage, and was also filed as a chattel mortgage; it contained a description of the machinery and the chattel property.

Kirby is a judgment creditor holding the balance of an unpaid judgment recovered against Morris, but whose lien is later than that of either plaintiff or Bingham.

Under this state of things Bingham's attorney claimed the engine, boiler and shafting to be personal property. Kirby, by his attorney, claimed all the personal property should be first sold because he had no lien thereon.

Upon these claims the matter was submitted to the court to decide upon an agreed statement of facts as between Bingham and the plaintiff. Held:

1. That the engine and boiler, together with the appliances attached and connected with them, which are used for the purpose of propelling the machinery, were realty, and were covered by the original mortgage which was made by Morris and his wife to Seymour, and which was subsequently assigned, together with the notes which were secured by the mortgage to the plaintiff.

2. That as between the mortgagee and the mortgagor there is nothing to indicate any purpose or intent to treat this description of property otherwise than what it was in contemplation of law—realty.

3. That no subsequent transaction, intention or purpose on the part of the mortgagor and mortgagee could affect the original mortgage.

4. That the defendant, who has the judgment lien upon the realty, is entitled to have the personalty which was mortgaged to secure the same debt which the realty was mortgaged to secure, first sold so as to relieve the property from the encumbrance of the first mortgages—he having no lien whatever upon the personalty, and both Stone and Bingham having a lien upon the personalty to secure the entire amount of their indebtedness, except the note secured only by chattel mortgage to Stone. The personalty should first be sold and the proceeds applied first to the payment of Stone's debt, which was not secured by the realty. One of the notes which Stone held was secured by a mortgage on this personalty. He has a right to have this personalty applied, in the first instance, to the payment of that mortgage note. All the other notes which were secured by a mortgage on this personalty were also secured by a mortgage on the realty. It does not make any difference so far as Stone or Bingham is concerned, whether the notes are paid out of the proceeds of the personalty or from any other fund.

B. R. Beavis for plaintiff; Brewer and Mix, Noble & White for defendants.

**\*FORECLOSURE OF MORTGAGE.**

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[Cuyahoga C. P., January Term, 1878.]

GEORGE ROBINSON ET AL. v. JOHN BERGHOLZ ET AL.

1. On sale of property to an infant and mortgage back to secure the purchase money, the infancy of the mortgagor is no defense to a foreclosure proceedings on the mortgage.
2. An answer by one of two partner mortgagors, showing that the mortgagee released the other mortgagor by indorsement on the notes, does not show an intention to discharge the mortgaged premises from liability, as there is no averment of consideration for the release, the indorsement not being under seal, the statute allowing release of one partner after dissolution does not apply, as it is not shown that the firm was dissolved, and as it is impossible to say what part of the debt remained to be enforced, no defense is shown.

PRENTISS, J.

This case has been submitted to the court upon a demurrer to the defenses made by Henry Binder to the petition of the plaintiff.

The action is brought to subject certain \*mortgaged premises to the payment of a mortgaged debt. The petition states that plaintiffs sold to John Bergholz and Henry Binder certain real estate, in part payment of which the defendants executed to the plaintiffs their joint promissory notes and a mortgage on the same land. The petition contains the averments necessary to entitle the plaintiffs to the decree which they ask.

The defenses demurred to, are, first, that when this transaction took place Binder was an infant within the age of twenty-one years.

Secondly, a release by these plaintiffs to John Bergholz, one of the makers of the notes, and one of the mortgagors, from any liability upon the notes or upon the mortgage. The defendant avers that this transaction of the purchase of this property by him and Bergholz was a partnership transaction, and he says the operation and effect of that release was to discharge him from any liability to pay one-half of these notes or from any liability upon this mortgage.

The first question is then, whether or not this defense of infancy is a good defense to this action. The demurrer, of course, admits the truth of the averments contained in the answer. I do not think the defense of infancy any defense whatever to this action. The sale and conveyance by the plaintiffs to these defendants of the land, the giving of these notes, and the execution by the defendants of the mortgage to the plaintiffs to secure the notes, were all one transaction. From anything appearing in this case, after the sale and conveyance by the plaintiffs to these defendants, the defendants went into possession of these premises, the presump-

tion would be that they did, in the absence of any averment to the contrary, and have continued in the possession of these premises ever since. This defendant does not undertake to disaffirm the entire contract, but only a part of the contract, that part which is burdensome to him; and substantially seeks to affirm that part of the contract which is not burdensome to him. In other words, this defendant affirms, substantially, the contract, so far as the sale and conveyance of the land is concerned, and seeks to disaffirm that part of the contract which consists in the making of this mortgage and these notes.

This defendant has been of age, probably, for a considerable period of time. If he desired to disaffirm this contract he should have done it in its entirety. He cannot disaffirm it in part, and affirm it in part, he must do it as a whole, or not at all. He has continued in the possession of this property from the time of the conveyance down to the present time. If he wished to disaffirm this contract he should have done it within a reasonable time after he became of age which he has not done at all. Inasmuch as he has not disaffirmed it as a whole, and has substantially affirmed it in part, he cannot disaffirm it in another part.

The defense of infancy, then, in my judgment, is not a valid defense.

The question then is, whether there has been such a release as to discharge these mortgaged premises from liability to respond to the full amount of these promissory notes.

The answer, in this particular, says that these defendants, Binder and Bergholz, were partners in the transaction, viz: in the purchase of the land described in the plaintiffs' petition and they made and executed their joint promissory notes on the first day of October, 1873, the mortgage bearing the same date and that thereafter on or about the ninth day of July, 1875, the said plaintiffs released the said Bergholz from any and all liability on said mortgage. That instrument of release has the signatures of the plaintiffs, and the seals of the plaintiffs attached to the signatures, and the defendant, Henry Binder, says that there is also indorsed upon the said notes the following indorsement, viz: "We, the payees, of the within notes do hereby release John Bergholz, one of the makers thereof, from any and all liability whatsoever in and to the within notes. July 9, 1875. Signed, George Robinson and Sarah Robinson." No seals are attached to their signatures. The above was indorsed upon each and every one of said notes. The defendant states the said indorsements were made with the consent of the defendant, but that he was then under the age of twenty-one years. He says, by reason of the indorsements above described, he was then and thereby released from the one-half of the amount due on said notes.

It is perfectly evident to my mind that there was no intention whatever on the part of these plaintiffs to release the land from liability to respond to the extent of these notes. The indorsement

upon the mortgage indicates that the plaintiffs intended only to discharge Bergholz from any personal liability upon or on account of that mortgage, nothing being said in the release about discharging the land, lands mortgaged are not affected, in my judgment, by the release which is indorsed upon the mortgage. That mortgage, notwithstanding that release, would stand as security for the payment of the entire debt, and must so stand unless the arrangement which appears by the indorsement upon the notes is a payment of some portion of this debt. If it be a payment of any portion of the debt, then, to the extent that the debt is paid, the mortgaged land is released. The question then is, whether the indorsement upon these notes, as claimed by the defendant, is substantially a payment of some portion of this debt.

In the first place, no consideration whatever is stated in these pleadings for this release; no consideration appears in the indorsement upon these promissory notes for the discharge of Bergholz from his liability therefrom.

However, inasmuch as the indorsement upon the mortgage was under seal, the law would imply a consideration for that release, the endorsement being a release of Bergholz from any personal liability on account of or upon that mortgage. But the indorsement upon the notes is not under seal, and therefore does not purport to be for a consideration as it would, in contemplation of law, if it were under seal. I have no sort of doubt whatever that in order to make a valid release there must be a consideration for that release. The books all lay down that doctrine, that a release without consideration is of no validity to discharge a debt. Then, inasmuch as there is no averment in this answer that there was any consideration for the release, that release without consideration constitutes no defense whatever to this claim of these plaintiffs.

But there is another difficulty which, it seems, may be an insuperable one. The claim made is that this was a release under the provisions of our statute relating to the release of one of several partners. In order \*to make a release of that character available as a defense there must be such a case shown as the statute in my judgment makes necessary. The statute provides "that when ever any co-partnership firm shall be dissolved or other wise, it shall and may be lawful for any one or more of the individuals who was or were embraced in such copartnership firm, to make a separate composition or compromise with any one or all of the creditors of such copartnership firm, and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred by reason of his or their connection with such copartnership firm according to the terms of such compromise."

There is no authority given in this statute to make any such compromise prior to the dissolution of the firm; and if this compromise, to be effectual, is dependent upon the provisions of the

statute, it is necessary, in order to show its validity, that it should appear in the answer setting up this compromise that this firm has been dissolved at the time of the making of this compromise, nothing of that kind appears in this answer. From anything appearing in this answer, this firm still continues in existence. This answer is defective, then, in not stating a case within the provisions of this statute. Another section of this statute provides,

"That such compromise or composition of an individual or of a firm with a creditor of such firm shall in no wise affect the right of the other copartners to call upon the individual making such compromise for his ratable portion of such copartnership debt the same as if this law had not been passed."

The substance of this statute is that that proportion of the debt, which, as between the partners, the compromising partner was bound to pay, shall be discharged by the compromise. He is not to be discharged under the provisions of this statute in any more than his proportion of the debt, the other partner with whom the compromise is not made still remaining liable for his proportion as between them of the compromised debt.

Now, there is nothing in this answer going to show, as between these partners, what were their respective proportions of this debt which was undertaken to be compromised. From anything appearing in the case, it was not one-half of this debt as is claimed by Binder, the defendant, it might have been one-half; it might have been a larger or a smaller proportion of this debt. It is impossible to say how much or how little was the proportion of the debt which, if the compromise was effectual, Binder is discharged from. He was discharged, certainly, only from such proportions of the debt as Bergholz was bound to pay; no more no less.

I think the motion should be sustained. Stone and Hessenmuller for plaintiffs; O. H. Bently, for defendant Binder.

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### INTEREST.

[Cuyahoga Common Pleas, January Term, 1878.]

JOSEPH STOPPEL v. J. KRAUS ET AL.

A decree for principal and interest on a note bearing interest at eight per cent. payable annually, should be for the whole, on the whole amount of principal and interest computed to the first day of the term, with interest on the whole sum thereafter, at the rate of eight per cent. till paid, without annual rests.

In this case a controversy arose upon the decree and judgment in regard to the interest to be computed thereon.

The plaintiffs claim with interest at eight per cent. to the first day of this term, amounted to the sum of \$37,000, of which \$54.00 was interest, and the balance principal. Plaintiff insists that the decree should carry eight per cent. on the whole \$37,000 payable



annually. The defendant insists that as there is no stipulation as to what interest the installment of interest should have been, the decree should be \$31,000 with interest at eight per cent., and \$54.00 at six per cent.

By the court Hamilton judge. Under section 10 of the interest law, 66 vol. Ohio laws, 91, the original contract is merged in the judgment and the decree should be for the whole amount; of principal and interest computed to the first day of this term with interest on the whole sum from said first day, at the rate of eight per cent. till paid, without annual rests.

### CORRECTION OF REPLEVIN BOND.

[Cuyahoga Common Pleas, January Term, 1878.]

(†) HARRY TAYLOR v. THOMAS GRAVES ET AL.

The bond was, in the first place, made for the sum of \$6. The constable, afterward, learning that the law required bond to be for not less than \$50, called upon Graves, one of the makers, and at the suggestion of Graves, the "\$50" was inserted in the place of "\$6." Held by Prentiss, J., that the bond was not void and Graves liable.

### MILITIA.

[Cuyahoga Common Pleas, January Term, 1878.]

STATE OF OHIO v. CITY OF CLEVELAND.

1. An action to recover a sum paid by a military organization for the use of an armory cannot be maintained in the name of the state against a city for a failure of the latter to provide a suitable armory for military organizations existing within its limits.
2. The only remedy in such a case is by mandamus.—[ED. LAW REPORTER. PRENTISS, J.]

The action on the part of the plaintiff is based upon a clause of the statute of the state which relates to the organization and enrollment of volunteer militia in this state, and which provides that every city in which any military organization exists, shall furnish the same with a suitable armory, and provide for paying the necessary expense thereof.

This action is purported to be brought by the state for the benefit of this military organization, and it is averred that this military organization, through some of its officers, has paid a certain sum for the use of an armory and this sum is sought to be recovered from the city.

There is no averment in the petition that this military organization is an organization existing within the city; and that is fatal

(†) See also 1 Clev., 178.

to a recovery, because the city is under no obligation to provide an armory, and pay any expenses connected with an armory except for military organizations within the city.

In the next place there is no averment in the petition that the state of Ohio has furnished anything. There is no contract alleged in the petition between the state of Ohio and this city, either express or implied, and therefore no liability on the part of this city to the state of Ohio can arise.

It is said that this military organization has paid rent for an armory and certain expenses. I think if the law would imply any contract growing out of these facts, it would be a contract on the part of the city to pay those who paid this rent and these expenses.

But there is no provision in this statute which gives the state any authority to institute an action for a failure on the part of the city to comply with this requirement of the law. The state of Ohio can no more maintain an action under such circumstances, than an individual can maintain such an action. It seems to me the only remedy for a failure on the part of the city to comply with this requirement of the law, to provide an armory and pay the expenses of it, is made by mandamus. The demurrer is sustained.

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### POUNDAGE OF MASTER COMMISSIONER.

Cuyahoga Common Pleas, January Term, 1878.]

HARMON V. BOUTALL ET AL.

When the buyer pays the amount of a mortgage directly to the mortgagee, the master is entitled to his poundage and has a right to return no sale, unless the purchase money is paid to him.

\*PRENTISS, J.

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In this case there is a motion on the part of one of the defendants (Wheeler) to retax the master's costs. The complaint in the case is that the master charged poundage which, it is claimed, he had no right to charge; and it is asked, having charged the poundage and taxed them in the bill of costs, that that error of the master may be corrected by a retaxation of the costs.

It seems that Harmon brought an action predicated upon the first mortgage to sell mortgaged property making Wheeler, who was a subsequent mortgagee of the same property, a party to that proceeding. In that proceeding a decree was made by which this mortgaged property was ordered to be sold, and the order required of the officer, to whom, for the purposes of its execution it was referred by the court, Mr. Lowe, that he should apply the proceeds, in the first place, to the payment of the costs of the proceeding; in the next place, to pay certain taxes which were the first lien upon the premises; in the next place, to pay the plaintiff's claim, and the surplus, if any, to pay over to the subsequent mortgagee,

Wheeler, who files this motion. The property was sold by the master and bid off by Wheeler.

The master claimed he was entitled to be paid poundage upon so much of the money \*as went, or was to go to pay the costs, taxes and the plaintiff's claim. 34

The facts of the case, I have no doubt, are correctly stated in the affidavit of the master. The principal facts in the case, outside of the statement of facts contained in the affidavit of Mr. Lowe, are the facts stated in the affidavit of Mr. Hinsdale, who was the attorney for Wheeler. The amount which was to go to the plaintiff was \$5,859.73. The amount which was to be applied to the payment of taxes and costs was \$264.95. Wheeler bid off the property at \$7,100. The amount of the bid was in excess of the amount of the plaintiff's claim and all the costs and taxes by \$876.32. This latter amount was to be applied upon Wheeler's claim. The master says: "I heard of no arrangement between the defendant Wheeler and the plaintiff, whereby no money to apply on the plaintiff's claim was to pass through my hands, and believe none was made until after the sale. The terms of the sale were cash, and so advertised. After the property was struck off by me to the defendant Wheeler, the defendant and plaintiff's attorney had a consultation, after which they together came to me, and plaintiff's attorney told me, on payment to me of costs and taxes, to report the sale for confirmation; that he would receipt for plaintiff's claim and it would be all right. The defendant (Wheeler) then inquired the amount of costs and taxes, and I told him \$264.95; and at the same time I told him that included poundage on the plaintiff's claim, whereupon the defendant raised the question of my right to poundage, where the defendant—being a lienholder—bought the property, and I told him I was entitled to the poundage on the taxes, costs and plaintiff's claim in this case, and the plaintiff's attorney agreed with me upon that point, and said to me that if they refused to pay the poundage he would have the plaintiff's claim paid in money or have the property advertised again, and I acted upon that assurance. The parties then went away and it was understood by all parties concerned that on payment to me of taxes and costs (as taxed), I should report a sale and ask for confirmation. This was on the day of sale, January 2, 1878, and on January 5th the defendant's attorney came with the money to pay costs and taxes. I asked what they had concluded to do about the poundage, and he said they should do as their clients ordered. I then asked him what his client said about paying the poundage, and he answered, "He told me to pay it if you demanded it," and that was all. He further said there was a question in his mind as to my right to it, but if I demanded it he would pay it. I told him he would have to pay it or I should report no sale, and, thereupon, he paid it; and nothing more was said about it until after confirmation, delivery of deed, payment of costs and taxes, satisfaction of plaintiff's claim in the case, receipts having been entered upon the

docket in full, and then that defendant filed his motion to retax my fees."

In addition to the facts contained in this affidavit I find by looking at the execution docket a receipt by the master for \$7,100, the amount of the bid of the defendant. This was on the 9th of January, 1878. On the same day the plaintiff's attorney executed upon the docket a receipt as from the master for \$959.78 in full of the plaintiff's claim. On the same day there was a receipt entered upon the docket of this court by defendant's attorney as having received from one master \$876.32 as the balance of the proceeds of sale after paying the costs, taxes and the plaintiff's claim.

In addition to the facts appearing from these receipts and the statements of the master, it appears that before this sale was made there was an arrangement or understanding between the plaintiff and defendant to this effect, that if the defendant should bid off this property, the plaintiff, so far as his claim against the property was concerned, would take in payment from this purchaser, the defendant, a promissory note on time secured by a mortgage. The master says he had no knowledge of this arrangement. After the sale was completed, the defendant having bid off the property, this arrangement was perfected by the execution by this defendant to the plaintiff of his promissory note for the amount of the plaintiff's claim upon this property and a mortgage to secure it. No money actually went into the hands of the master.

Now, the statute regulating the master's fees provides that the master shall have the same compensation for any services which he may render, as the sheriff is entitled to have, and by the law the sheriff is entitled to have poundage, except where the property is bid off by the plaintiff, upon all monies actually made and paid to him.

One of the questions in the case is whether, in contemplation of the law, or in legal effect, the money upon which the poundage is charged was actually made and paid to the master. Now, these parties, the plaintiff, the defendant and the master, treated it as money actually made and paid to the master. The receipts indicate upon the execution docket clearly that the parties so treated the matter. Another question is whether, they having so treated the matter, it is not substantially, by reason of such treatment, money made and paid to the master, and by him distributed according to the requirements of the order. I have been referred to two cases, one in the 2d Ohio Reports, and one in the 26th Ohio Reports which are supposed to sustain the claim which is made by the defendant, that the master was not entitled to poundage as he charges. Those cases are cases where there was nothing whatever made by the officer. I do not mean that the officer in the case in the 26th Ohio State did not offer the property for sale and did not strike the property off to the bidder; but I mean that the court, in that case, hold that, inasmuch as there was no confirmation of the sale, there was no sale. A sale was initiated, but never completed

in that case. So that that case is not like this case, inasmuch as in this case there was a complete sale.

In the case in the 2d Ohio Reports there was no sale whatever. That was a case where property had been levied upon only; never had been offered for sale, and after the levy upon the property, the parties settled the claim, and the sheriff thought, under these circumstances, he was entitled to poundage. The court held that he made no money, because he made no sale, and, therefore, was not entitled to poundage. But here is a case where, as I have said, a sale was actually made—where the parties treated the transaction as a sale made—as money actually made, and as money actually coming into the hands of the master, and by him paid over to the parties who were entitled to it.

Now, in point of fact, no money went into the hands of this master, except so much as was necessary to pay the taxes and the costs. In such a case as that, in legal effect, was money made by the master or paid by him? Suppose that, instead of taking money, a government bond had been paid to the master, bank stock, or that any description of chattel property had actually been paid to the master which the plaintiff was willing to receive from the master as money. Does anybody doubt that if the master had actually handled a government bond or bank stock, or the chattel property and the party entitled to the money, the plaintiff in this case, actually received it from him as money, it would in contemplation of law, and in legal effect be so much money? I cannot entertain any sort of doubt about that—that this plaintiff might authorize a master to receive anything under the heavens as money; and if the master did actually receive that which he was authorized to receive as money by the plaintiff, and turned it over to the plaintiff, it would be as money paid to him. I cannot entertain the least doubt about that. But this case, however, is a little varied from that—where the master never had the handling of any money at all. It did not go into the hands of the master, in point of fact, although, as I have said, all of these parties treated it as if it had gone into the hands of the master; and if they did, is it not, in legal effect, money in the hands of the master actually paid to him? It seems to me it is—that that must be the legal effect of the transaction. I think, then, that this transaction, as between the master and the plaintiff and this defendant, amounted to the making of the money by the master, and the actual payment of the money to him, which entitles him to charge poundage.

But there is another ground upon which, in my judgment, this defendant cannot make this claim as against this master.

Now, this master was authorized by the attorney of the plaintiff to treat this transaction between the plaintiff and this purchaser as so much money paid to him, and he was told by the plaintiff's attorney that it should be so treated with a view of enabling him to have his poundage, the attorney of the plaintiff thinking him to be equitably and justly entitled to this poundage; and

he told him that unless this defendant would pay this poundage, he should return to the court no sale of this property. The plaintiff's attorney thus authorized the master to act; and the master notified this defendant that unless he paid the poundage which he claimed, he should make a return of no sale of this property. The defendant then agreed to and actually did pay to the master this poundage, and the master was induced thereby to return the sale as having been made and to procure a confirmation of this sale.

**35** \*It is said by the attorney for this defendant that he made this payment under protest. What he means by that I do not exactly understand, except, perhaps, he means that he paid it, signifying or stating his objections or unwillingness to paying it. Notwithstanding he signified his objection to paying it he paid it, and that was a voluntary payment. He was under no sort of compulsion to pay it. He might have withheld the payment of it, or might have paid it as he chose to do. If he did not pay it he was perfectly well advised by this master that he would return the property as not sold. The master had a perfect right to do so. He had sold this property for cash, as all property is to be sold by a master, unless there is a special order in a particular case for a sale upon credit, and until he got the cash he was not bound to return the sale. The master was entirely right in his claim that this defendant should pay to him the money; that the transaction should be treated and regarded by all the parties as a payment to him of money, or he would return no sale of the property. This defendant then, by his promise to pay, and actual payment, to the master, induced him to do what he otherwise would not have done—to return a sale of that property and procure a confirmation of it. After having done this, he sets up a claim that the master is not entitled to this poundage as against him. Is he not, in law, estopped from doing that under those circumstances? Can there be any doubt about it? It seems to me it is very clear that he is estopped by what appears in this case from resisting the claim of this master to his poundage.

The motion is overruled.

For motion, Foster, Hinsdale & Carpenter; for master, P. P.

### SLANDER.

[Cuyahoga Common Pleas, January Term, 1878.]

DANIEL COFFEE V. JOHN COWLEY.

Words charging that the plaintiff on a certain occasion was drunk, and that he was a common drunkard are not actionable *per se*.

PRENTISS, J.

This is a demurrer to the petition on the ground that the petition does not state facts sufficient to constitute a cause of action. This is an action for slander. The slanderous words stated in the

petition are that the plaintiff, on a certain occasion, was drunk, and that he was a common drunkard. The question is whether those words are *per se* slanderous.

Now, in order to constitute these words actionable in themselves, in my judgment according to the decisions which have been made by the supreme court of this state, as well as in accordance with the general rule upon the subject, it is either necessary, if it is claimed that they impute criminality to the plaintiff, that the offense which they impute to the plaintiff should be an indictable offense, and that that offense must involve a high degree of moral turpitude, or subject the plaintiff to infamous punishment.

In the first place, drunkenness is not an indictable offense under our law; and in the next place, it is not an offense, even if it were indictable, involving a high degree of moral turpitude, or an offense which subjected the offender to infamous punishment. So that, upon the ground of those words charging a crime, they are not actionable under the decisions in this state.

In the next place, if it is not claimed that upon that ground they are actionable *per se*, they must, in order to make them actionable *per se*, according to a decision made by our own supreme court, found in the 27 O. S. R., be spoken of the plaintiff in reference to his profession or his calling. There is no averment in this petition that they were spoken of this plaintiff in reference to his profession or calling. In the case to which I have referred, a clergyman was charged with drunkenness. The averment in the petition in that case was that the charge was made in reference to the profession of the plaintiff as a clergyman; and there was proof upon the trial of the case that they were so spoken of the plaintiff; and the supreme court held in that case, that, inasmuch as the words were spoken of the plaintiff in reference to his professional character, they were *per se* actionable; holding substantially in conformity with the doctrine as laid down in Townsend on Slander, that if they were not spoken in reference to the professional character of the plaintiff they would not be actionable.

The demurrer to the petition is sustained.

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### \*STREET ASSESSMENT.

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[Cuyahoga Common Pleas, January Term, 1878.]

#### CALEB MORGAN V. CITY OF CLEVELAND AND THE TREASURER OF CUYAHOGA CO.

1. The city council, in making the assessment under the limitation contained in section 543 of the Municipal Code, to pay the expense of the improvement, is not required to wait until the improvement is done before making the assessment.
2. The limitation contained in this section relates merely to the extent of the charge; and no time is attempted to be fixed when the charge may be imposed; but the statute authorizes an assessment, and its collection, before the improvement is actually made. [ED. LAW REPORTER.]

PRENTISS, J.

This is an application for an injunction for the purpose of restraining the collection of an assessment, which was made by the city on certain lands of the plaintiff, and also to restrain the city from putting upon the duplicate for the purposes of collection certain installments of that assessment.

On the 25th of August, 1874, the city council of the city passed a resolution to open and extend Wilson avenue between Sawtell avenue and Broadway. On the 1st of September, 1874, they passed an ordinance to lay out, open and extend this avenue, and to appropriate land for that purpose, and ordering that the cost and expense be charged upon the lots or parcels of land benefited thereby. On the 15th of March, 1875, the city condemned and appropriated for this purpose lands of the plaintiff and of other owners. On the 19th of September, 1876, the city council appointed an assessing board for the purpose of assessing this cost and this expense upon the lands in pursuance of their previous ordinance. On the 7th of October, 1876, the assessing board reported an assessment. On the 12th of December, 1876, objections having been made to the assessment made by this board, the city appointed an equalizing board. On the 22d of January, 1877, the equalizing board reported an equalized assessment, which was on the same day confirmed by the city council. On the 25th of August, 1877, the city passed an ordinance making the assessment in conformity with the report of the equalizing board, and making it payable in five annual installments. On the lands of the plaintiff was charged an assessment of \$17,930.60. Upon two of the lots mentioned in the petition was charged \$9,067.35. It is alleged that these lands upon which this sum was assessed, were not, at any time since the report of the equalizing board, worth more than \$23,000. Upon lots of the plaintiff, Nos. 321 and 325, was charged and assessed \$8,644.50; and it is alleged that at no time since the report of this equalizing board, were these lands worth more than \$27,500. It is further averred that each of these assessments exceeded, at the time of making the assessment, twenty-five per cent. of the value of the lots after the improvement was made.

39 \*All of the legal questions made in this case, except a single one, have been determined by this court, and, of course, I shall not undertake to overrule any previous determination of this court upon these legal questions.

The remaining legal question is this (and I have no knowledge that that question, exactly in the shape in which it is here presented, has ever come before this, or, perhaps, before any other court in this state, or elsewhere): as to the time to which it is to be referred to determine the value of the property charged with reference to the ascertainment and determination of the amount which may be charged upon the property under the limitation prescribed by the law. That limitation is twenty-five per cent. of the value of the property after the improvement is made. I think that limit-



ation means exactly this, and nothing more than this: that, in determining the extent to which a charge may be made upon property, under the provisions of the general law authorizing it to be charged for improvements, you are to regard the value of the property as that value is, or will be, with the improvement made. You are not required to wait until the improvement be made in order to make the charge, or to determine the extent of the charge; but you may, before the improvement is made, make the charge; but that charge which you do make cannot exceed twenty-five per cent. of the value of the property, with the improvement actually contemplated to be made, and ordered by the action of the city council to be made. In making this charge, you may then treat the improvement, whenever you do make the charge, as made, and if the amount charged does not exceed twenty-five per cent. of the value of the property with the improvement contemplated to be made, there is no excess of the limit prescribed by the law.

It is said that it is difficult to ascertain, until the improvement be made, what effect the improvement contemplated to be made will have upon the property as increasing or diminishing the value of the property. That is, probably, all practically true. You cannot tell as well before as after the improvement is made what the effect of the improvement will be, in that particular, upon the property. But there is always, in all cases, a basis upon which a calculation can be made of the effect of the improvement upon the property. The plans and profiles, the descriptions of the improvement are required to be deposited in an office of the city accessible to everybody, so that everybody may know just the extent and character of the improvement. So that that objection, it seems to me, is entitled to very little consideration; and it obviously does not require a postponement of the assessment until the improvement is made, inasmuch as the legislation authorizes an assessment and a collection of the assessment before the improvement is actually made. That statute is a mere limitation upon the extent of the charge, no limitation at all upon the power of the city to make the assessment, and it does not attempt to define or fix the time when the charge may be imposed.

It is claimed in this case, on the part of the plaintiff here, that the time, in reference to which the value of this property is to be ascertained, is the time of making the assessment. If that be not the time, then the time is the time when the city has acquired, as against the land owner whose property is charged, the right to the land, by paying him the amount of damages which are awarded to him in the proceeding to condemn and appropriate the property.

It is claimed on the part of the city that the time to which the value is to be referred for the purpose of ascertaining the extent or limit of the charge, is the time when the ordinance is passed for the purpose of making the improvement, and providing how the improvement shall be paid for, whether upon property abutting,

contiguous or adjacent to the improvement, or property benefitted by the improvement, and ordering the condemnation of property for the purpose of making the improvement; or if that be not the time to which it is to be referred to ascertain the value of the property, with a view of fixing the limit of the assessment, then the time is when the property is actually condemned for the purposes of the improvement.

Upon this question, as I have said, exactly in the shape in which it is presented here, I know of no precedent; and it is not an easy question to determine, in view of all the light which is thrown upon it by the legislation of this state.

Now, I should not be disposed to grant an injunction to restrain the collection of the assessment upon the ground that the assessment exceeds the proper limit unless I were reasonably satisfied that there is such an excess. If it be a matter of doubt, I should deem it my duty to refuse the injunction, inasmuch as the party who may be injured by the over-assessment is not without a remedy. If there be an over-assessment, according to the provisions of the law, that excess of assessment is to be paid by the city; and if the land owner pays it, he has a remedy against the city to recover back that excess; so that he is not without relief, not without a remedy. And in a doubtful case, inasmuch as there is a remedy which would be available to him to fully reimburse him for what he has been compelled to pay, which the city ought to pay, I leave him to that remedy.

This is a case in which, as I have suggested, there may be, and I think is, very considerable doubt; and what the supreme court would say upon this question it is beyond my ability to form any opinion, unless the supreme court in a case to be found in the 29th of Ohio State, have substantially adopted a rule which determines it. The case to which I have referred is the case of *Douglass et al. v. The City of Cincinnati* for a certain improvement which was made by the city of Cincinnati, the expense and charge of which was imposed by the ordinance of that city upon the abutting property—property abutting upon the improvement. At the time of the ordering of the improvement, one of these plaintiffs owned a lot of land which abutted upon the improvement. After the city had passed the ordinance ordering the improvement, and before the city passed the ordinance assessing the charge upon the property, the owner of the property conveyed the part which abutted upon the improvement to the other plaintiff, retaining the other, or real portion of the lot. Eleanor Douglass, who owned the whole lot at the time of the passage of the ordinance providing for the improvement claimed that that part which she retained after the conveyance to the other plaintiff was not chargeable with any portion of the expense of that improvement. Her grantee (the other plaintiff,) of the front part of the lot which abutted upon the improvement claimed that that was overcharged—that there could not be, under this limitation to which I have referred, a

charge upon that part which abutted upon the improvement to exceed the sum of \$150. And the question then substantially arose as to the time to which it was to be referred to determine what property could be charged for the improvement, and the extent to which that charge could be made. [The court here read in full the case referred to.—Rep.]

Now, the supreme court in this case have determined that, for the purpose of ascertaining what property is to be charged, in pursuance of the ordinance imposing the charge, you are to look to the time of the passage of the ordinance determining the propriety of making the order for the improvement. That is the time to which you are to look with the view of determining what property is to be charged, and not the time of actually making the charge upon the property. Now, if it be true, that you are to look to the date of the passage of that ordinance for the purpose of determining the property to be charged, why not also look to the time of the passage of that ordinance for the purpose of determining the extent of the charge which is to be made upon the property? Why not the one as well as the other? I can see no reason why, if you look to that period of time for the purpose of determining what property is to be charged, you should not look to the same period of time for the purpose of determining the extent to which the property may be charged. And there is good reason, it seems to me, for fixing that as the period of time by which to determine the extent of the charge to be made upon the property. The city council look at the property, its situation, its condition, its value, when they determine to make the improvement; and they determine to make the improvement, and charge the expense upon that property, knowing its situation, condition and value, and they, probably, when undertake to charge the whole of the expense upon the property, determine, in the first place, that it would be just and equitable to do so, and in the next place, they determine that they will do so, for the reason that no part of the cost or expense of making the improvement will fall upon the city, considering the situation, condition and value of the property at that time. If the property was not of sufficient value to pay the expense and cost of the contemplated improvement, it may be that the city would not make the improvement. But, finding it to be of sufficient value to pay the costs and expense of making the improvement, the city council proceed to order the improvement to be made.

Now, in this case, it is clear, from the testimony, that, at the time of the ordering of this improvement, the charge which was actually imposed upon this property did not exceed the limits provided by the statute; but, in consequence of a deterioration in the value of real estate in the locality of this improvement and in all other parts of the city, this whole charge which was imposed upon the property, at the time of the passage of the ordinance charging the property, did exceed the limit allowed by law for the charge.

40 Now, which time is to be looked to—the \*time when the city ordered, under these circumstances, the improvement to be made, or the time when they actually assessed upon the property the charge by the ordinance imposing it?

It seems to me, from the best light I have and the best construction I can give to this decision of the supreme court, that they have substantially disposed of this question; but it may be that they have not. There is a distinction between that case and this. In that case the property upon which the charge was imposed was the abutting property. In this case the property upon which the charge was imposed was the property benefited by the improvement, including, of course, that which was abutting, and some that was not abutting, though in this case, the whole property charged with the expense of this improvement was, in point of fact, abutting property, and upon no other than abutting property was this charge imposed by the ordinance. In this case the excess of the charge, if there be any, grows out of the diminished value, from general causes, of this property. In the Cincinnati case the diminished value of the property which actually abutted was occasioned by the act of the owner of the property in making the conveyance after the improvement was ordered. That is the only distinction that I can see between the two cases. With my present views upon the subject, I shall refuse the injunction.

H. C. White, and Henderson & Kline for plaintiff; Heisley & Weh for city.

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### CONDITIONAL SALES.

[Cuyahoga Common Pleas, January Term, 1878.]

#### WHITE V. SINGER MFG. CO.

Where property is sold on condition that title is to remain in the seller until the agreed payments are made, with right to seize the property in case of default, title does not vest in the buyer until performance.

43 \*This was an action for the recovery of the value of a sewing machine, and was submitted to the court on an agreed statement of facts, from which it appeared that on the 5th of March, 1876, the Singer Manufacturing Company leased to one Barbara White a sewing machine of the value of eighty dollars. The lease was in writing and contained the usual terms of a sewing machine lease, stipulating, among other things, that the company was to receive as part payment an old machine valued at \$20, balance in monthly cash installments of \$5 each; that the title was to remain in company until all agreed payments were made, with right to seize the machine at any time or place, in case of default. It also appeared that in March, 1876, \$2.50 was paid, which was all

the cash paid on the lease, and that in the month of August following, the company, by its agent, seized and took possession of the machine for default in payments. Plaintiff is the husband of the lessee, and claims that the lease was in legal effect an absolute sale.

PRENTISS, J. Held:

That the case must be governed by the ruling of the supreme court in *Sanders v. Keber*; 28th Ohio St., 630.

Judgment for defendants.

J. T. DeWeese for plaintiff; John Coon for defendant.

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### APPEALS.

[Cuyahoga Common Pleas, January Term, 1878.]

MRS. H. A. WHITE V. CHARLES COATES.

An action of replevin is appealable, where the case is tried to a jury and judgment is rendered in favor of plaintiff for only twelve dollars.

An action in replevin is instituted before a justice of the peace. The case is tried to a jury; and a judgment is rendered in favor of the plaintiff for the sum of twelve dollars and a fraction, and an appeal is taken to the court of common pleas. A motion to dismiss the appeal, on the ground that the action was not appealable, was by the court, Prentiss, J., overruled.

C. L. Fish for motion.

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### JUDICIAL SALES.

[Cuyahoga Common Pleas, January Term, 1878.]

P. C. CULLEN V. GUSTAVE SMIDT, GUARDIAN, ET AL.

A transcript of the judgment of a justice is being filed in the Common Pleas for execution, and a sale of the land thereon is made, the purchaser cannot file a motion to set aside the sale on the ground of irregularity in the judgment proceedings.

In this case a judgment was rendered before a justice of the peace, a transcript filed in the court of common pleas, and a sale made of lands belonging to the judgment debtor. A motion was made by the purchaser to set aside the sale on the ground of irregularity in the judgment proceedings.

The court, Prentiss, J., held, if there was error in the judgment proceedings there is another remedy to the party—a petition in error to reverse the judgment; but this purchaser can file no petition in error to reverse the judgment. If he did not get a good title at the sale it is his misfortune. There is no warranty of title by the officer or by the judgment creditor.

The motion is overruled.

O. H. Bentley for motion. Stone & Hessenmueller for defendant.

**PLEADING—MORTGAGE.**

[Cuyahoga Common Pleas, January Term, 1878.]

**GEO. C. EBERT v. HENRY J. CUBBON.**

A prayer in a foreclosure proceeding asking for the sale of certain mortgaged lands, to pay the mortgage debt, is sufficiently definite and certain.

**PRENTISS, J.**

The brief states that this application is made to require the plaintiff to state whether he wants a judgment or to state what he does want.

The petition is upon a mortgage, and it asks for a sale of the mortgaged property to pay the mortgage debt, the mortgage being given to secure certain promissory notes which are set out in the petition. This plaintiff wants, probably, what he asks for, and what he does not ask for, does not want. I think he wants (because he asks for it) a sale of this property to pay this mortgage debt. The petition is sufficiently definite and certain.

J. W. Heisley for plaintiff; Quayle for defendant.

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**JUSTICE OF THE PEACE.**

[Cuyahoga Common Pleas, January Term, 1878.]

**HONORA ENGLISH ET AL. v. MRS. ANN BROOKS.**

An action to recover money paid on a verbal land contract, which has been repudiated by the vendor, is not an action on a contract for the sale of land, but for money had and received and may be sustained before a justice of the peace.

In this case an action was instituted before a justice of the peace to recover the sum of \$164, money paid upon a verbal contract for the sale of land, the defendant having refused to make a deed of the lands to plaintiffs, in accordance with the terms of said verbal contract. A judgment was rendered before the justice and an appeal taken to the court of common pleas. A motion was made to dismiss the appeal on the ground that the justice had no jurisdiction of the action, the same arising out of a contract for the sale of the land.

By the court, M'Math, J., held:

That the defendant having abandoned the contract, and refused to comply with its terms, the plaintiffs had a right to bring their action, as for money had and received, in any court of competent jurisdiction, to recover the money paid.

The motion overruled.

E. M. Brown for plaintiffs; Ingersoll & Williamson for defendant.

**\*PLEADING.**

46

[Cuyahoga Common Pleas, January Term, 1878.]

† B. H. ROBERTS v. J. B. GLENN ET AL.

A petition on a note against a maker and indorser, and to foreclose a mortgage securing it, given by the maker, and also to subject the separate property of the indorser, a married woman, which she had agreed to charge with the payment of her indorsement, contains three causes of action, which must be separately stated and numbered.

PRENTISS, J.

The motion in this case contains two specifications. The first specification asks that the plaintiff shall separately state and number his causes of action. The second asks that there should be stricken out of the petition all that part of the same relating to the sole and separate property of the defendant who makes this motion, and that part of the prayer of the petition that asks that that sole and separate property may be subjected to the payment of the claim of the plaintiff. The action is brought for the purpose of recovering an amount due upon a promissory note, and also to subject the same premises, which were mortgaged to secure the payment of the promissory note, to the payment of the note. The promissory note was executed by Theresa Cunningham, who is the mover in this case. She was a married woman at the time of the indorsement of this promissory note. The promissory note was executed to her by Joshua B. Glenn, and was indorsed by her to the plaintiff. The action is brought against Glenn and this indorser of this promissory note for the purpose of recovering a judgment upon the promissory note against both Glenn and this woman as indorser of the promissory note, and also for the purpose of subjecting the premises, which were mortgaged by Glenn, and to secure the payment of this promissory note. There is a further averment in the petition that at the time this promissory note was thus indorsed by this woman, she had certain other real estate, describing it, which she intended to charge with the payment of this promissory note at the time she thus indorsed it to the plaintiff.

It is said there are three causes of action stated in this petition, one upon the mortgage of Glenn, another against Glenn as maker, and still another against this woman as indorser of this promissory note. I think there are three causes of action stated in this petition, and they are all contained in a single statement. There is but one cause of action separately numbered and stated in this petition. But there is but one cause of action stated as against Glenn as maker and this woman as indorser of this promissory note. The statute allows an action to be brought against the maker and indorser of a promissory note; and when an action is brought against a maker and indorser of a promissory note, there is but one cause of

† See also 1 Clev. 194.

action stated in the petition. But there is a cause of action against the maker and indorser of this promissory note, there is another cause of action predicated upon this mortgage, it being sought to be foreclosed, and there is another cause of action against this married woman for the purpose of subjecting her separate property to the payment of this promissory note, indorsed by her, on the ground that she contracted to charge that separate property with the payment of this promissory note.

I think the petition is defective in not separately stating and numbering these three causes of action. The idea of the plaintiff's attorney seems to be that inasmuch as the statute allows several cases of action to be united in the same petition it may be done in a single statement. That is a mistaken notion. It is true you may state in the same petition several causes of action, but they must be separately stated and numbered. I think the motion in that particular should be sustained. But I think it is perfectly proper, were an attempt made to subject other property to the payment of a debt of a married woman, to make the statements which are necessary to be made in the petition in order to subject that property to the payment of the debt. Without those statements her lands could not be charged with the payment of this promissory note, and for the purpose of charging these other lands they are properly incorporated in the petition. In that particular the motion is overruled.

### PAYMENT.

[Cuyahoga Common Pleas, January Term, 18 8.]

†ARTHUR J. WENHAM v. M. N. CAMPBELL ET AL.

C. purchased a stock of goods of W., and to secure the payment of the purchase money executed a mortgage on premises owned by him under an assignment of a land contract. C. afterwards formed a partnership with R. and R. in the sale of the goods purchased. Subsequently the goods were resold to W. by the partnership, the latter receiving the said notes and mortgage of C. in payment. R. afterwards by indorsement of the firm name, transferred two of the mortgaged notes to the plaintiff, who was a creditor of the partnership, in payment of a debt due plaintiff from the partnership. C. thereafter assigned the land contract to his brother, who paid the remainder of purchase money due on the contract, and received a deed from the vendor of the contract, and made valuable improvements upon the premises. The action is for a foreclosure of the mortgage. The court, in determining the rights of the respective parties, *Held*:

1. That R., as a member of the partnership, has authority to sign the notes and mortgages in payment of a partnership debt, and that the plaintiff obtained a perfect title to the same.
2. That the making of the mortgage by C., operated as an assignment of the equitable interest which he had in the property, and the subsequent assignment of the contract operated to transfer what remained of his interest in the property.
3. The plaintiff being the owner of the prior equity, it must prevail; and from the proceeds of sale the assignee of the contracts is first entitled to be reimbursed for money paid as the balance due on contract, less value of rents and profits.—[ED. LAW REPORTER.]

†Decision of the district court upon an action to foreclose the mortgage upon which this action was brought and involving the facts herein, is found in *Wiggins v. Campbell*, 2 Clev., 122.



BARBER, J.

This is an action to foreclose a mortgage executed by the defendant, M. N. Campbell, on certain premises described in the petition to secure the payment of four promissory notes of \$1,000 each, the purchase price of a stock of groceries bought by said Campbell of one M. D. Wiggins, who was the payee of the notes. The notes were payable in July, 1874, January, 1875, July, 1875, and January, 1876, respectively. The mortgage was given by M. N. Campbell on the 1st day of January, 1874, upon certain premises in which he was the owner of an equitable interest by virtue of an assignment of a land contract, upon which he had paid a part of the purchase money, and made valuable improvements upon the premises. The mortgage was duly recorded. After this transaction the defendant Campbell entered into partnership with two men in carrying on the grocery business. Before this subsequent transaction one of the notes was paid, leaving three notes unpaid. Previous to the final transactions the second note became due at one of the national banks, in the city of Cleveland. The parties resided in Newburgh. For the purpose of taking up this one note when it matured, Campbell, with the defendants Runals and Wiggins, as indorsers, executed a note to the South Cleveland bank for the sum of \$1,000. The money was obtained, and the former note was taken to the South Cleveland bank, and, as the court finds the fact to be, was left there as collateral security for Runals and Wiggins on the indorsement on Campbell's note, the money being borrowed by Campbell. Subsequent to that transaction, in December, 1874, these parties, M. N. Campbell, Rockefeller and Runals, who were partners in this business, and joint owners of the store, sold it back to Wiggins, who held the two notes, and in part payment took back the two notes and the mortgage. M. N. Campbell claims that in this sale these two notes were to be returned to him as his property and thereby paid. The other parties claim that the two notes became the property of the firm, being bought with firm property. The plaintiff, Arthur J. Wenham, being a creditor of this firm, called on the firm for his pay. One of the members of the firm, who had obtained possession of those notes, turned over those notes and mortgage to this plaintiff in payment of the debt due from the firm. When the sale was made and the notes transferred by Wiggins, he indorsed his name upon the notes, so that he became an indorser; and then the firm name of Campbell, Rockefeller & Runals was indorsed upon the back of the note, and they are made defendants in this case as indorsers.

Now, it is claimed by the defendant Campbell in this case that these notes were obtained by Runals by fraud; that by the contract they were to come directly to him. Now, I find the fact to be, and I have no doubt as to the evidence in the case, that these notes became the property of the firm of Campbell, Rockefeller & Runals, and either of the parties was entitled to the possession. At the time the transfer was made Campbell seemed to have been detained

somewhere else by sickness, and Wiggins called the attention of Runals to the fact that he ought to take possession of those notes, and without any agreement, possibly, about it, he did take possession of them and turned them over to Wenham in payment of a firm debt.

It is said that Runals had no interest in this firm property—never had paid into the firm but a small sum, \$125, and took out \$150 more than he paid in, and that Rockefeller had but a very small interest in the firm property. So far as the evidence before the court is concerned, they were clearly partners in the concern, whatever their mutual liabilities, one to the other, may have been. That is not for the court to dispose of in this case. In the opinion of the court the mortgage was rightfully turned over to Wenham, and he became the rightful owner.

A written agreement, appointing Runals the agent of the firm for the purpose of closing up its business, was introduced in evidence. I do not find in it any such general terms as would convey authority to him to dispose of this paper. If the paper had not been drawn I think he could have done it just as well; so that it does not materially strengthen the plaintiff's case nor detract from it.

It is said another paper was drawn up in which these notes were expressly excepted, but the parties did not assent to it. The evidence clearly shows, while there was some controversy at the time as to whether Campbell should not have these two notes that he afterwards acquiesced; so that I have no doubt the plaintiff obtained a good title to this mortgage.

The more difficult questions in the case arise upon the consideration of the rights of the respective parties. M. N. Campbell seems to have been in failing circumstances at that time, and when he found this note and mortgage had gone into the possession of Mr. Wenham, he sold his interest in this real estate made—an assignment of the land contract to his brother, living then in Iowa. I think there is no doubt from the proof that his brother paid full consideration for the property. There is some suspicion thrown over the acts of these parties, but I think the preponderance of the proof is that he paid full value for the property and took an assignment of the land contract—paid the balance due upon land contract and took a deed directly to himself. The Payne brothers, who were the holders of the legal title, made a deed to William Campbell, the brother of M. N. The question arises, what are the rights of these parties in respect to this real estate? Whether this mortgage attaches as a lien to this real estate; whether William Campbell, who claims to own this property, is entitled to it. After a careful examination of the questions in this case, I am satisfied that the making of the mortgage by M. N. Campbell was an assignment of the equitable intent which he had in that property. That was its effect. It did not attach as a mortgage to the real estate. The case of *Churchill v. Little*, 23 O. S., is a point, and decisive of this case. Wiggins, by the mortgage, took an assignment of

the equitable interest of M. N. Campbell. Subsequent to this mortgage an assignment of the land contract was made to William Campbell, and by that assignment he took simply what was left of his brother's interest in that property. The person who takes an assignment of an equitable interest stands in the place of his assignor. Where two persons have an equity, the priority equity must prevail. The condition of the parties is simply this, that Wenham owes the prior equity in this case, and on foreclosure there should be allowed to William Campbell, out of the proceeds of sale, the amount which he paid to Payne brothers for the legal title—the balance due on the contract—less the value of the rents and profits, for the time he has been in possession of the premises.

J. J. Carran for Wenham; Tyler & Dennis for Wiggins and Runals, Peck, Critchfield, and Henderson & Cline for Campbell.

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**\*FUGITIVE FROM JUSTICE.**

**\*51**

[Cuyahoga Common Pleas, January Term, 1878.]

AT CHAMBERS.

†FRANCIS A. NOLZE V. JOHN M. WILCOX, SHERIFF.

1. In a proceeding on *habeas corpus*, for the discharge of a prisoner from arrest on a warrant of extradition issued by a governor in compliance with the requisition of a governor of another state, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding state.
2. In order that a person may be classed as a fugitive from justice, the commission of the criminal act with which he is charged, must have been committed by him in the state that charges him with the act. In other words, he must have come *bodily* within the jurisdiction and under the power of their laws at the time he committed the offense.

McMATH, J.

A demand has been made upon the governor of Ohio for the arrest of one Francis A. Nolze. This demand, it appears, was made by the governor of New York, under and by virtue of the constitution and laws of the United States. It appears from the demand of the governor of the state of New York, that Francis A. Nolze is charged with the commission of a crime in that state; and it further appears from the demand made by the governor of New York, that it has been represented to the governor of the state of New York that Francis A. Nolze has fled from the justice of that state and is now in the state of Ohio. Upon the presentation of the demand of the governor of New York to the governor of Ohio, the latter issued his warrant, which reads as follows:

"WHEREAS, A requisition has been made upon me by the governor of the state of New York for the surrender of the body of Francis A. Nolze, a fugitive from the said state of New York,

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† Judgment affirmed by the Supreme Court, 34 O. S., 520.

\* For page 52, see end of this case.

charged with the crime of obtaining goods by false pretenses, as appears by a copy of an indictment, which, duly certified as authentic has been filed in the executive department. Therefore, I do hereby command you forthwith to arrest said Francis A. Nolze (addressed to the sheriff of Cuyahoga county) and bring him before any judge of the court of common pleas in this state, in whose district or jurisdiction such person so charged may be found, to be examined upon said charge, and otherwise dealt with as provided by law. Of this warrant, you will, with your proceedings thereon, make due return according to law."

It appears that by virtue of this warrant the sheriff of Cuyahoga county arrested the said Nolze, and made return of the writ to a judge of the court of common pleas of this county, as he was required by law to do.

Primarily this case came before me upon a hearing under the statute which I will now read: "That whenever the executive authority of any other state or territory of the United States shall demand any person found in this state as a fugitive from such state or territory, and shall, moreover, produce with such demand a copy of the indictment found or affidavit made before a magistrate of the state or territory, charging the person demanded with having committed treason, felony, or other crime within such state or territory, duly certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the governor to issue a warrant to the sheriff of the county in which such person so charged may be found, commanding him forthwith to arrest and bring such person before any judge of the supreme court or any judge of the court of common pleas in this state, in whose district or jurisdiction such person so charged may be found, to be examined on said charge."

The charge made in the city and county of New York is made by the presentation of an indictment by the grand jury of the city and county of New York. That is the predicate upon which the demand upon the governor of Ohio by the governor of New York, is based. A certified copy of that indictment must follow the requisition, or demand; but when the governor of the state of New York reaches that point of the proceeding the organic law of the republic speaks: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in

53 another \*state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. So that the mere finding of an indictment by the grand jury of the city and county of New York would not of itself be the predicate for the demand upon the governor of the state of Ohio for the surrender of Nolze. But the governor of New York says it has been represented to him that Francis A. Nolze has fled from the justice of the state of New York, and is now in the state of Ohio. It was not represented to him by the indictment, nor was it represented by the affidavit which

was made charging the commission of the crime, but by a separate and independent affidavit accompanying the indictment, that the party named in that indictment has fled from the state of New York. In the absence of the affidavit that the person has fled from the state of New York the demand upon the governor of Ohio would not be a sufficient demand. There must be some proof offered, not only to the governor of New York, but also the governor of Ohio, that the party charged with the commission of the offense in the state of New York has fled from that state. This necessarily raises the question, which was discussed quite at length by counsel, who have been heard at length upon every conceivable point raised by this proceeding, whether any paper, in plain terms, that may be issued by the executive of any state is conclusive as to the facts therein set forth. The executives of the several states of the American union, in their respective jurisdictions, like the most inferior officers, are subject to the laws of the land. This is a government of law; a government of checks and balances, hence it follows, "as the night the day," that the law of the land and not any officer, is supreme. The act of the governor of Ohio, in this matter, as in many others, may be made the subject of examination and adjudication in the courts authorized by the constitution of the state of Ohio, to the same extent as if the act had been performed by a township or county officer. Then the question arises what is meant by the legislation of 1875? Before proceeding to consider that question I propose briefly to call attention to the legislation of congress upon this subject, because the organic act of the republic does not execute itself. That clause of the constitution of the United States which I a moment ago read, can not execute itself. There must be agents, officers—some person designated by law to carry its provisions into effect. "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear"—substantially, if you please, the identical language of the first section of the act of March 23, 1875. Before the adoption of this statute, it is manifest, on a moment's reflection, that the executive of the state of Ohio, for the time being, in the determination under the laws, exercises judicial functions. He must determine the fact or facts upon the proof submitted. But the legisla-

ture of Ohio, for very wise reasons, I think, enacted a statute that, while it does not take from the executive the purely ministerial part of his office, has determined that the tribunals known to the constitution and laws of the state shall determine the legal questions if any are raised and not that the governor of Ohio shall determine them.

Before the adoption of this statute if the governor's order of arrest was issued and placed in the hands of the sheriff he was directed immediately to deliver the party to the agent of the governor who made the demand; and if the citizen was so far beyond the reach of the courts of his state that he could not make application for the writ of *habeas corpus* to have the question tested, he might have been taken out of the state without first having the question whether he was the proper subject of extradition, judicially determined. The law, being constantly jealous of the rights of the citizen, and aiming and endeavoring to be exactly just to all, has not only thrown this safeguard around the citizen, but has imposed upon a judge of the supreme court, or of the court of common pleas the absolute duty of making an examination.

Now, I must say, frankly, that when I had my attention first called to the opinion of Judge Avery, a hasty reading of it and hasty reading of this statute, led me to the conclusion that Judge Avery's opinion is the correct one; but I must say now that I differ in toto from him. This examination is, to all intents and purposes, an examination in pursuance of the writ of *habeas corpus* without it. The order of arrest issued by the governor is not, in any sense of the word, conclusive of the rights of the citizen. It may be examined into. If the judge should discover that upon the face of the warrant it was defective or illegal he may order the discharge of the party; or he may hold the party and require all the proof that was submitted to the governor to be brought before him, to enable him to make the judicial examination that the law imposes upon him.

Now, it will be observed that in the Hamilton county case—the Rothchild case—with Judge Avery it was only a question of identity. It is the governor's duty, in a proper case, to issue this warrant, he cannot withhold it; but the legislature has declared that the court shall determine whether the party arrested is the party named in the writ. We are furthermore to ascertain whether the party did flee from justice. We will not stop to inquire whether he committed a crime in the state of New York. That has been *quasi* adjudicated by the proper authorities of the city and county of New York, charging this man, in the form of an indictment, with the commission of a crime known to the laws of the state of New York. There is no obligation resting upon the judge at Chambers, in hearing an application of this kind, to determine  
54 whether the crime was committed \*in the state of New York.

The court cannot stop to inquire whether the party is guilty or innocent of the charge; but it becomes the duty of the court to

inquire whether the party fled from justice in the state of New York.

Now, the hearing of this matter, going hand in hand with the allowance of the writ of *habeas corpus*, presented to counsel, and, doubtless, to many others, a very novel proceeding. It was claimed here in argument by counsel, that the writ of *habeas corpus* could not be issued while this prisoner was in custody or during the examination before this court. I need not stop to inquire whether there is any conflict between this legislation and the general act providing for the writ of *habeas corpus*. It is sufficient to say that there is no power in this state that can stay that writ. In a certain exigency the writ of *habeas corpus* may be suspended. That exigency has not arisen. It is sufficient for the court to know that that writ by the executive authority of the state, has not been suspended. When applied for, upon a proper showing, it must be granted. All the discussion about the hearing under this statute and the allowance of the writ of *habeas corpus* by another judge of this court was regarded by myself, at this time, as a useless waste of time, for it settles nothing. I have no power to suspend the writ. If there is a conflict of law presented, it may become necessary for the court to determine the question of conflict, but that is not here.

Counsel upon both sides seem to have had the impression that they were limited in the examination to this statute, and perhaps, upon the one side thought, as a greater safeguard, they would apply for the writ of *habeas corpus*. With their motive I have nothing to do, but we find both before us.

The question now is, whether the court can dispose of this matter under the statute, or whether it must be disposed of under the writ of *habeas corpus*. I think the statute itself is sufficient, but without giving any further reasons, will simply say: It is claimed on behalf of those who are resisting the writ of *habeas corpus* that this crime was committed in the state of New York. Counsel objected to the admissibility of testimony. The objection was overruled and testimony was heard under the proceedings in *habeas corpus*.

That is where we stood precisely, at that moment; but I cannot see why all the testimony that was heard could not have been heard under the statute. The question arises now not whether this man committed an offense in the state of New York, but whether at the time of the commission of the offense he was in the state of New York. Those resisting the *habeas corpus* claim, as matter of law, that the relator while bodily in the state of Ohio, and in the city of Cleveland, did obtain property by false pretenses in the state of New York; and authorities were cited that leaned somewhat, in fact, pretty strongly in one instance toward that view of the case—that a party might be in the state of Ohio and at the same time commit this offense in the state of New York—remaining bodily present in the state of Ohio. I apprehend that upon a review of the

authorities it would be found that while the conversation, agreement or understanding that was talked of and considered in the state of Indiana and carried into effect in the state of New York, that there was a bodily presence of the perpetrator of the act within the jurisdiction of the state of New York, either in person or by his agent who was co-operating with him; hence the court there very properly held that the act was committed in the state of New York.

I find, however, upon an examination of the authorities in the state of New York, and the authorities of the western states, there is a very great contrariety of view upon this question. I can very readily comprehend the motive underlying these decisions of the New York judges and see where they tend. While they are tending in the direction that a man may constructively commit an offense of this kind in the state of New York, the western authorities take the ground, in plain terms, that there must be an *actual* presence in the state when the offense was committed. The commercial and trading classes of New York live in a metropolitan city. It is our money center, and the great trade center of the continent. Every state in the union pays duty to New York. Every state in the union sends merchants and trading classes to New York to buy. Their policy would be to enlarge their jurisdiction—spread their power over greater territory than the state of New York. There is a constant tendency in some of their decisions, not only upon this, but other questions of a commercial character, toward consolidation and a strengthening of the laws of the state of New York, to be able to reach out anywhere and everywhere to catch somebody who owes them something. But the naked legal rights of the citizen is not to be determined by the amount of money he may owe, nor by the nature and character of his contract. If he is charged with the commission of a criminal act; the act must have been committed by him in the state that charges him with the act, in other words, he must have come bodily within the jurisdiction and under the power of their law at the time that he committed the offense. I need not cite a large number of very well considered authorities upon this point. Counsel upon both sides are familiar with them. It seems to me a moment's examination of the organic act of the republic would show—"Charged with treason, felony, or other crime, who shall flee." That is an act on his part. He must flee from justice. He must escape, get away from. Now, how could it be said he had fled from a place if he had never been there? How could it be said that a man could steal a horse in New York, he remaining all the time in Ohio? He must have been within the state of New York. He must have been amenable, for the time being, to her laws. He must have committed the act complained of, and after the commission of the act, there must be a fleeing. He must be found domiciled for the time being, in another state.



Now, the question is whether the court would hear proof to show whether this party was actually in the state of New York at the time. Accompanying the requisition of the governor of New York is found this affidavit: "Louis F. Metzgar, being duly sworn, deposes and says: that he knows Francis A. Nolze"—the indictment says, Francis A. Nolze, of the 1st ward of the city of New York. Well, he may be there—"That the said Francis A. Nolze was, on the 28th day of February, 1878, indicted for the crime of obtaining goods by false pretenses; that before being arrested the said Francis A. Nolze fled from the state of New York, and is now a fugitive from justice at Cleveland, in the state of Ohio." Now, that is not the predicate upon which the governor of the state issued his requisition. The indictment is that paper. But before he could make the demand upon the governor of the state of Ohio, he had to have some proof tending to show that the man fled, else it would be useless to make the demand. We have been told that we can not hear proof as to whether the party has fled. Now, if Francis A. Nolze was not in the state of New York at the time of the commission of the offense, in fact, and did not flee from justice from the state of New York, I should like to know, if the theory of Judge Hord be correct, about reaching out in Cleveland and obtaining goods by false pretenses in the state of New York, why that man is not guilty of perjury in the state of Ohio? Why does not that affidavit follow him, on the one hand, just as well as the pretenses, it is claimed, follow the other? This affidavit is contradicted by volumes of proof showing that he was not only not in the state of New York at that time, but that he had not been there for months previous; that he did not flee from the state of New York neither on the 21st of July, nor on the 25th day of July, 1877, and that he had not been there since those days. Then how could he have fled from justice after the finding of that indictment? I do not stop to inquire whether the charge is true or false. It is not the duty of the court to do that; but we have a right to inquire into all of the facts. Before we can order the surrender or extradition of a citizen we must know that he is the party charged with the commission of the offense; we must know that he was in the state at the time the act was committed. We must know that after committing the act he actually fled from the state and escaped the justice of that state.

It is claimed here that this order of arrest does not charge a crime. It says "charged with the crime of obtaining goods by false pretenses." It is not necessary for the court, at this time, to pass upon that question. I find that under the authority of Judge McLain, and numerous other authorities that are cited here, that the court, sitting at Chambers, under the *habeas corpus*, has a perfect right, and it is the duty of the court, not only to inquire about this paper, but to go behind it. That is what I have been doing. I not only rely upon this paper, but go behind it—bring in array every act, except the acts charged in the indictment.

It is claimed here that this does not describe a crime known to the laws of Ohio; that it does not import a crime to obtain goods by false pretenses. Upon an examination of the statute of the state of New York, I find that the obtaining of goods by false pretences is not a crime, but that the obtaining, with the intent to cheat and defraud, constitute the crime. But I do not dispose of this case upon that question, as I find enough in it to let that question remain open and give no further opinion upon it. I will simply say, that as I am not preclude under this statute, from examining into every step of the executives of both of these states, nor precluded from hearing testimony in the proceedings upon *habeas corpus*, I declare and order the relator to be discharged from custody; that his detention is illegal.

J. W. Heisley, H. McKinney for Nolze; J. K. Hord, S. M. Eddy for sheriff.

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\* PLEDGE.

[Cuyahoga Common Pleas, 1878.]

JOHN C. LESTER v. L. HERMAN &amp; Co.

The mere agreement between a pledgor and a pledgee that the latter may sell the property at either public or private sale, does not authorize the pledgee to sell without giving notice to the pledgor, so that he may have an opportunity to redeem.

PRENTISS, J.

The question raised by the demurrer in this case, is whether or not the pledgee of property can sell the pledge without first giving notice to the pledgor that he is about to sell it, that the pledgor may have an opportunity to redeem. I think it is the duty of the pledgee to give that notice before he can sell, although there is a contract between the pledgor and pledgee that the latter may sell the property at either public or private sale, there being no agreement to waive notice. Reno for plaintiff; Young & Green for defendant.

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\*ASSESSMENTS.

[Cuyahoga District Court, March Term, 1878.]

DANIEL HAMMOND v. FREDERICK W. PELTON, TREASURER.

Watson, Hale and Tibbals, JJ.

1. The mere fact of petitioning for a street improvement does not estop one to claim that the assessment exceeds twenty five per cent. and that an annual installment exceeds ten per cent. of the value of the land.
2. When an installment of an assessment is found to exceed ten per cent. of the land, the excess may be adjudged against the following years.

TIBBALS, J.

This case comes into this court on appeal from the judgment of the court of common pleas in which the petition was dismissed. The petition, however, has been amended since the appeal to this court; so that it presents a different question from that presented in the court below.

The plaintiff seeks to restrain the collection of two assessments made for the improvement of Superior street. He sets up, that he is the owner of a certain piece of land in what was formerly East Cleveland and the township just outside, being a tract of land of some 29 or 30 acres; that within the old village of East Cleveland was a little piece of his land containing about one acre and a half. He says that proceedings were instituted by the village, first, to widen the street, by which they took a portion of his land; subsequently, assessed as his portion of the assessment for the widening of the street, a tax to the amount of \$541.90. The village was annexed to the city of Cleveland in a proper way, and then an assessment subsequently made in the year 1874. By his amended petition he sets up that this \$541.90 is in excess of the 25 per centum of the real value of the land after the improvement was made, and also that it was more than 10 per cent. in any one year of the real value of the land after the improvement, for which he seeks to have it restrained. It also appears that the street was subsequently improved by being graded and a tax therefor levied upon that piece of land, excluding interest to the amount of \$1,234.46, interest having been added for the deferred payments, making it something over \$1,300. He says in like manner, that this assessment is in excess of 25 per centum of the value of the land, also in excess of the ten per cent. per year after said improvement. He seeks to have it also restrained.

There is but little difference between the parties except as to two propositions; and, as we view it it results in the determination of two questions of fact. It is true the city claims, as matter of law, that because this plaintiff petitioned for the improvement of this street he is, therefore, estopped from setting up this excessive taxation. We hold, that this is a statutory provision, and they are entitled to tax up to 20 per centum and 10 per centum per year, and anything in excess of that must be paid by the city. The two questions of fact, then, submitted are, first, as to the quantity of the land. The city claims that there was more than an acre of land in the piece. The petition, in describing the land, sets up that it was bounded on the north by the city lines and south by the center of Superior street. The city admits that to be true, but it claims that the city line is 50 feet further north than the plaintiff claims. The plaintiff claims that the original lot line was on the northerly line of the city or village, but by an examination of the question it is ascertained that it is fifty feet further north; so that there is fifty feet more land in it than the plaintiff claims.

The city also claims that there is a jog in the street, as the

street actually lies, so that it is some thirty feet further south, making, in all, eighty feet more of land, its entire length, than the plaintiff claims in his petition.

We have reached a conclusion that the preponderance of the evidence is with the city upon that subject, and instead of there being an acre and a half of land, less the amount taken by reason of widening the street, there remains a little over two acres of land liable to be taxed; secondly, the remaining question is as to the value of this land after the improvement. In this case, as in all others, upon the question of values, the witnesses have different opinions, those on the part of the plaintiff estimating the value by reason of the shape of the land, it being a small triangular piece, so that it could not well be allotted to advantage, and by the further fact that there runs through it a deep gulley—that it is of but little value. Their evidence is based upon the theory that you must determine the value or the price of the land by itself, as it would be determined if one man alone owned it. But the fact is, it is simply a part of a tract, the remaining portion of the land lies outside of the city. While it is true no tax can be levied on that lying outside of the city, we think the fair way of getting at the value of this land is to determine it in connection with the remaining land owned by this same party. He may allot it, or may sell it in connection with that; and whatever this piece of land in the city is worth—that should be the basis.

Without taking time to discuss the evidence upon the subject, we have concluded that the fair value of this land would be about \$1,000 per acre, and upon that basis it would make the price of the land within the city worth \$2,300. They are entitled to assess one-fourth of the value and ten per centum each year of that value.

60 The first year they assessed \$541.90, 25 per cent. of the whole of it would be \$575, so that the entire assessment is a valid assessment. But they assessed the whole of it in one year, and the amount exceeding ten per centum of the value, that being \$230—to that extent the assessment was excessive, they paying it all in one year. It should have been divided so as to pay \$230, per year.

We hold they are entitled to make, exclusive of the interest upon the different payments, which they include, that amount to \$1,234.46, and they are entitled to assess as the 25 per centum \$575. It follows, of course, there is \$659.46, excessive, that this land is not liable to pay taxes for, and which should be paid out of the city fund. That, also, is in excess of the ten per centum per year, which they are entitled to assess.

The order we make in the matter is to allow the whole of the first assessment, the \$230, of which is now payable. Interest may be added on the deferred payments to the balance that should be assessed in the coming two years, not to exceed this ten per centum. The same rule will apply to the amount to be assessed, the \$575. As to the residue of the assessment, the injunction will be made perpetual.

C. D. Everett for plaintiff; Heisley & Weh for defendant.

**HUSBAND AND WIFE.**

[Cuyahoga District Court, March Term, 1878.]

**MOSES ROSKOPH v. JOHN G. COATES ET AL.**

Watson, Hale and Tibbals, JJ.

In a petition against a husband and wife on an account, it is necessary, in order to have judgment against the wife, to aver that she intended to charge her separate property and that she is possessed of separate property.

HALE, J.

This case comes into this court by petition in error to reverse the judgment of the court of common pleas. As we view this case it presents no question not fully settled by the supreme court. The action was commenced before a justice of the peace by the plaintiff in error, and the plaintiff below, to recover a judgment against John G. and Nancy Coates, husband and wife, upon an account. A judgment was rendered in the justice court and an appeal taken to the court of common pleas. In that court a petition was filed describing the cause of action in the ordinary form, alleging the defendants were husband and wife, and setting out a copy of the account and asking a judgment upon that account. There is no averment in the petition that the wife was the owner of a separate property, nor that the debt was contracted with the intent and purpose to charge that separate property—simply a description of the cause of action, as if Mrs. Coates were a *feme sole*. We understand that the supreme court have decided that it is necessary to aver and prove the fact that the debt was contracted with the intent to charge such separate property. In addition to setting out the cause of action in the ordinary form, which would be good against a *feme sole*, there should be the \*further averment in the petition that the party was possessed of separate property and that the debt was contracted on account of such separate property. On the trial of the case there was an attempt to prove that Nancy Coates, the defendant, was the owner of separate property and that this debt was contracted on account of such separate property. The court, because there was no such averment in the petition, refused to admit the testimony but took the case, as to the defendant, Nancy Coates, entirely from the jury, allowing it to proceed against John G. Coates. In this we think the court ruled correctly. Judgment below affirmed.

W. C. Rogers for plaintiff. C. W. Coates for defendant.

**\*NOTICE—EASEMENT.**

[Cuyahoga District Court, March Term, 1878.]

Watson, Hale and Tibbals, JJ.

JOHN BROOKS v. H. A. MASSEY ET AL.

A right, on easement, which a party has no notice of, actual or constructive, does not follow the property into hands of a purchaser.

WATSON, J.

This was an action upon a promissory note against the defendants, Massey and Irvin. They came in and set up, by way of answer, that the note was given for the purchase money of certain real estate, and that there is an encumbrance upon the property—an easement which belongs to the Rolling Mill company. The Rolling Mill company is brought in and made a defendant for the purpose of ascertaining the value of that lien with a view to recoup from the amount due the vendor of the real estate, Brooks, for the purchase money. They also allege that Horace Wilkins has purchased an interest from Irvin. It is a little difficult for me to see why Wilkins was brought in, but he was brought in and made a defendant. These parties then allege that the property was purchased for the purposes of allotment; that the easement of the Rolling Mill company, which is to pass water diagonally across this land, spoils a great portion of it for the purposes of allotment. Issue is taken upon that and a jury is summoned and empanelled, and the court, having heard the evidence, charged the jury and submitted to them certain interrogatories, and among them was the interrogatory whether these defendants, when they purchased that property, had any notice of the existence of this easement. The right to this easement was evidenced by a very informal instrument of writing. It was not executed in the form of a deed, not attested or acknowledged, and not recorded. In that condition of things they claim, notwithstanding these defects, that the license became executed whenever the Rolling Mill company expended its money in putting down its pipes, and applying them to the passage of water through this land to their mills. The pipes passed from the Cuyahoga river to the mills. They claim that this license, being executed, is irrevocable. We have examined the case very fully. We accept the doctrine that this license was, as between Brooks and the Rolling Mill company, irrevocable. But it does not follow, being irrevocable between Brooks and the Rolling Mill company, that Massey, Irvin and Wilkins, the purchasers, are bound by it, and are compelled to permit it to remain there forever to their damage.

If this had been a deed and recorded, of course, there would have been constructive notice. Of course, if the pipe had been

visible, there would have been actual notice to these purchasers; it would have put them upon their guard, and they would have been bound to make inquiry and ascertain what claim these persons in possession had upon that real estate. But these pipes were from two to four feet under ground. There was no visible possession. There was nothing to notify purchasers. These purchasers say they had no notice. That question, among others, was submitted to a jury upon an interrogatory, and the jury found that they had no notice. If that finding was out of the case, and the matter came before us upon the evidence alone, we should have to reach the same conclusion; for there is no evidence of the notice to these purchasers in the case.

What was the legal, logical result when these persons took it as purchasers without notice? They took the land disencumbered of this easement. As between them and the Rolling Mill company the Rolling Mill company had no rights. As between Brooks and the Rolling Mill company the mill had, originally, rights. Whether they have any other rights or not, as against Brooks, since he has parted with the land, we need not stop to inquire. The logical result, then, was that everything else was eliminated from this case, and it became a plain action upon a promissory note for so much money. As to this, on the pleadings, the case stands upon default. There is no question as to the execution of the note; no question as to its amount. There is no issue for a jury to try, and we think the court very properly made the computation upon the note, and rendered a judgment in favor of the plaintiff for the amount appearing due upon its face. Entertaining this view of the case, it follows, as a matter of course, that we must affirm the judgment of the court below:

It is claimed here, seriously argued, that Brooks could sell nothing more than he had. That we readily concede; but a right of which a party has no notice, actual or constructive, an equity, easement, or anything of that kind, does not follow the property into the hands of a purchaser. No case had been shown to us, nor have we been able to find any case, where, such a doctrine is recognized. The strongest case upon that point that has been cited, is upon a supplemental brief that has been handed to us by the defendants, a Pennsylvania case of a dam. The purchaser was bound before the dam had been rebuilt. We can arrive at no other conclusion than that there were the remains of a dam there at the time of the purchase and enough to put the party upon his inquiry; and being put upon his guard, he is bound by the rights of the party holding the evidence of lien or incumbrance or equity or easement, or whatever it may be. But their purchasers did not come into that shape at all. There was nothing to admonish them, nothing to put them upon their guard when they paid their money or gave their obligations that it was not property free from any incumbrance of the kind. It follows, as a matter of course, they

67 are bound by their obligation. \*They cannot withhold any part of the purchase money when there is no lien upon that land. The whole object of the amended statute of 1870 is, that they may not lose by an incumbrance actually upon the land, and whenever it appears there is no incumbrance, there is nothing to litigate about in that direction. Everything of that kind is swept out of the case, and it remains, as it originally was, simply an action for the recovery of the purchase money.

The judgment will be affirmed.

Ingersoll & Williamson for plaintiff; Marvin, Hart & Squire, Willey, Terrell & Sherman, Tyler & Dennison, Bernard & Beach for defendant.

### LIFE ESTATES—ASSESSMENTS.

[Cuyahoga District Court, March Term, 1878.]

LYDIA CRAWFORD v. LUCIEN CRAWFORD.

LYDIA CRAWFORD v. ASA BARBER.

Watson, Hale and Tibbals, JJ.

A life tenant of an estate having paid an assessment for the improvement of the property may recover from the remainder man an amount in proportion according to the relative value of the improvement to the respective estates.

HALE, J.

The two cases of Lydia Crawford against Asa Barber and Lydia Crawford v. Lucian Crawford, are in this court by appeal from a decree rendered in the court of common pleas. Mrs. Crawford owns a life estate in two separate parcels of land, one of which is owned, subject to said life estates, by the defendant Barber, and the other by the defendant Crawford.

Prior to 1874 the city of Cleveland improved Superior street, by widening the street as one improvement, and by grading and curbing as another. Assessment was made upon these separate parcels of land, amounting, in the one instance, to about \$1,800, and, in the other, to nearly \$1,700, to pay the costs of these improvements. As the statute then stood, Mrs. Crawford, owning the life estate, was compelled to pay these assessments, and was given a right of action, against the owner of the remainder to recover such proportion of the assessment as was equitable and right. These actions were brought. Under that clause of the statute, which reads as follows:

"Where a special assessment is made on real estate subject to a life estate, such assessment shall be payable by the tenant for life upon application by said life tenant to a court of proper jurisdiction by action against the owners of the estate in life, such court may apportion the cost of said assessment between the life tenant and



the owner in fee, proportionate to the relative value of said improvement to their estates respectively."

It is claimed, on the part of these defendants, that the owner of the life estate is compelled by the statute, in the first instance, to pay the assessment; that, having paid it, she can recover of the owner of the remainder only such sum as his property has, in fact, been benefitted; that the recovery is limited to that amount; while it is claimed, on the part of the plaintiff, that the cost of the improvement is to be apportioned to the two estates, according to the benefits to each.

The construction claimed here by the defendant is this: "Supposing the cost to have been \$1,800, as in one of these cases, and the actual improvement to the property of the remainder man to be \$5,000, the recovery is limited to that sum; if there is no improvement in fact to the owner of the remainder, then no recovery can be had against him. It is claimed that the recovery against the owner of the remainder can in no event exceed the benefit to his property. We cannot give the statute such construction. The sum to be apportioned among the parties, is the cost of the improvement. By the terms of the statute that cost is to be apportioned between two owners in proportion to the improvements to the estate of each. We are given a definite sum that must be divided between the owners according to the benefits to each.

The remaining question in this case is, how shall the cost of these improvements be apportioned between these two parties. The actual cost of the improvement, in the one case, was about \$1,800, and in the other \$1,700, and if there is any reliance to be placed upon the testimony that has been offered, and we see no reason why there is not, the actual improvement to the property is a very small sum. The proportion is, in fact, about this, as nothing is to nothing, so is the whole cost to the sum each shall pay. This fails to give us a result. We must apportion the cost in some shape. The widening of the street may, probably will, in time, result to some advantage to this property; but almost its entire value, whether more or less, must result to the owner of this property in the future. Mrs. Crawford is sixty-four years of age. Very little of the actual benefit of that improvement can result to her. Indeed, nearly the same might be said of the grading and curbing. The cost far exceeds the benefits. There is a loss to be borne by the parties. It is rather a question of apportioning the loss than determining the improvement. We have concluded in the case that the best that we can do is to order one-third charged to Mrs. Crawford in each case, and the balance to the owner of the remainder in fee, and that may be the decree.

Ingersoll & Williamson for plaintiff; M. R. Keith for defendant.

**CHATTEL MORTGAGE.**

[Cuyahoga District Court, March Term, 1878.]

**C O. HART, ASSIGNEE, ETC., v. STEPHEN HEARD ET AL.**

Watson, Hale and Tibbals, JJ.

A mortgage on the goods, fixtures and accounts of a business, without any change of possession, is void as against the mortgagor's assignee for benefit of creditors as to the stock of goods, but good as to the store fixtures and the amount realized from the accounts.

WATSON, J.

In this case we have made an examination, and have reached a conclusion.

In 1873 James M. Heard gave his father, Stephen Heard, two promissory notes. They remained unpaid, with the exception of a release of them, \$2,150, until February, 1875. James M. Heard, then executed to his father a chattel mortgage upon his stock of goods, he being then in Gregg doing business as a dealer in jewelry. That mortgage was executed upon the 3d of February, and was finally deposited in the recorder's office upon the 8th, the debt being unchanged in form, the original notes remaining as the evidence of the debt. A further credit was given. As to the date of payment, it is alleged, "until on or about the 1st of March, following" is the language. On the 13th of March James M. Heard assigned to the plaintiff for the benefit of his general creditors. The assignee files a petition in which he seeks to clear the stock from the incumbrances of the mortgage of Stephen Heard and another mortgage, and asks for an order to sell property. The other mortgagee, Bowles and somebody else, dropped out of the case, and it remains here for trial between the assignee, Hart and Stephen Heard. At the time Heard took his mortgage there was no change in the possession of the property. It remained on the ordinary conditions of chattel mortgages until the death of the vendor and became due, unless circumstances intervened to authorize the mortgagee to take possession. There was no change in that property. The mortgage covered the stock, the fixtures, and the accounts of James M. Heard. As to the accounts I understand that counsel do not make a contest, and the main contest in the case is as to the goods. They remained in the show-cases without any change of possession, without any visible change in their condition. The mortgagor was left in possession. There was no provision in the mortgage limiting his powers at all beyond giving the mortgage as a security for this debt, and he continued there with the store open

68 from the time the mortgage was \*deposited, the 8th of February, up to the time of the assignment—about a month.

The evidence is a little conflicting as to what was sold; but whether it be much or little, we can reach no other conclusion than

that the goods were left there subject to the power of James M. Heard, the mortgagor; that he \*had the control and management—the handling of them—the disposition of them, and that that was the understanding of the parties at the time of the execution and delivery of this note. 69

And with this view of the subject, we, as a matter of course, hold that as to the goods the mortgage is void as against creditors. The fixtures were not subject to sale, and we do not think that it was the intention that they should be sold or disposed of. We hold the mortgage of Stephen Heard good as to the fixtures, which, with the best light before us, we estimate in value at \$300. It is admitted that upon the accounts there was realized, which is in the hands of the receiver, the sum of \$100. The proceeds of the sale are in the hands of the receiver to be disposed of as the property would be if it were in being.

The court hold, therefore, that out of the proceeds of the sale of those fixtures, the mortgagee, Stephen Heard, is entitled to receive for the fixtures \$300, and \$100 for the moneys collected upon the accounts, and the balance of the proceeds should go to the general creditors. Henderson & Kline for plaintiffs; W. C. Rogers, Marvin, Hart & Squire for defendants.

### APPEALS—MOTIONS.

[Cuyahoga District Court, March Term, 1878.]

#### FOREST CITY STONE COMPANY V. CLINTON FRENCH.

Watson, Hale and Tibbals, JJ.

1. Where a judgment is rendered by a justice against a defendant not present, and an appeal bond is given by the defendant's attorney without authority, which is immediately repudiated by the defendant, who, instead, seeks to move to vacate the judgment, the justice does not err in regarding the appeal as a nullity and in entertaining the motion.
2. The statutory provisions requiring that a motion, before a justice, to open up a judgment, be in writing stating the grounds, and that it be verified, may be waived by the party on the other side and an oral motion consented to is good.

TIBBALS, J.

The error complained of in this case is that the court of common pleas erred in affirming the judgment of the magistrate. The case before the magistrate, briefly, was this:

On the 11th of July, 1872, the plaintiff brought his action in replevin against the defendant. On the 16th, the return day, it appeared that personal service had not been rendered upon the defendant; a copy had been left at his residence, he being absent. On the 29th of July a trial was had in the absence of the defendant, resulting in a finding by the magistrate that the right of the property and possession thereof was in the plaintiff, and assessing

nominal damages. On the 31st of July the record shows that an attorney for the defendant appeared and put in an appeal bond, appealing the case to the common pleas court. On the 2d of August the defendant, for the first time, appeared in person, and he then informed the magistrate that the attorney was not authorized to appeal that case to the common pleas court in his behalf; that he did not desire to appeal it, and repudiated the entire thing. He said, on the contrary, that he desired to open up the judgment. The magistrate seems to have recognized the fact that this attorney had no authority to put in that appeal bond. On the 8th of August the defendant appeared in person, and the attorney for the plaintiff, recognizing the fact that that appeal bond was put in by one having no authority, if we may so presume the fact, then waived the statutory provisions requiring the motion for the opening up of the judgment, to be reduced to writing and be sworn to, and consented to hear it orally. They agreed upon the 15th of August as the time to hear that motion to set aside that judgment. The defendant, however, had already paid the costs. There was nothing to do but to hear that motion, set it aside, if there was sufficient ground for it, and proceed to trial. On the 15th of August the record shows the parties appeared, and that the case was continued from week to week, and from time to time, until the 9th day of November. On the 9th of November the plaintiff's attorney made a motion to dismiss any further proceeding before the magistrate, on the ground that the case had been appealed into the common pleas court, then stating that that appeal bond was good, and that the justice had no further jurisdiction in the case. At that time, on the 9th of November, the magistrate overruled that motion. The case was then continued from time to time, when, the record shows, the parties appeared, and, by consent, it went over until the 1st of March of the following year, at which time the plaintiff's attorney notified the magistrate that he should not appear any further in the case, and if the defendant wanted a trial he might go ahead and have it. The case was continued until the 8th of March. At that time, the plaintiff's attorney not appearing, a trial was had before a jury, resulting in a verdict in favor of the defendant, finding the property in him, and assessing the damages at \$75.00, the justice thereupon rendered a judgment for that sum.

In that state of affairs a petition is filed in the common pleas court assigning for error—

"1. Erred in entertaining or considering the motion to set aside the judgment rendered by said justice in favor of the plaintiff against the defendant, on the 29th of July, after the defendant had entered into an undertaking to appeal the action into the common pleas court."

"2. The magistrate erred in overruling the motion to dismiss because the case was appealed to the court of common pleas court."

That raises the question as to the effect of entering into that appeal bond. There is no doubt, if the appeal bond had been perfected,

it ended all proceedings before the magistrate. He had no jurisdiction to do anything further in the case. His proceedings were entirely stayed, and it is a simple question whether the record shows that that case was appealed. We must be governed by the record. The record shows, simply, that an attorney appeared in the absence of the defendant, and entered into that bond. The defendant immediately came in, before any further steps were taken in the matter, and repudiated the action of that attorney. He said he had no authority to appeal his case, he did not intend, and did not want to appeal it. It would hardly do to hold, as matter of law, that a stranger could come into a magistrate's court and enter into an appeal bond, and thus bring the case into the common pleas court against the will or authority of the party. We think, under the finding in the record, that the justice must have come to the conclusion that this attorney was a mere interloper there; that he had no authority to put in that bond, was not authorized to do it, and, therefore, that it was a mere nullity. That case remained there on appeal. If that be true, it follows, of course, that the magistrate did not err in that record.

Another error assigned is that the justice erred in entertaining or considering the motion of the defendant to set aside said judgment, rendered by said justice, in favor of the plaintiff on the 29th of July, without the defendant having made any written motion sworn to, and without paying costs. The costs were paid by the parties. The statute provides that this shall be done—that the party within ten days, shall make his motion in writing, setting forth the grounds, shall verify it, shall pay the costs, and, if the magistrate find the ground of his absence sufficient, he will then open up the judgment and the case will remain for trial.

It is claimed that the attorney of the plaintiff had no authority to waive the reduction of this motion to writing. We regard it as in the light of a process. The statute provides how a party shall be notified—how served with a view to having a hearing. It can hardly be doubted, if the parties had come in and consented, orally, to have the judgment set aside, the magistrate \*had full 70 authority to do it. We see no reason why the plaintiff's attorney could not waive reducing that motion to writing, and say, "We will hear it; you may make your motion orally, and the magistrate may pass upon it." That he consented to that and waived its being reduced to writing, clearly appears from the record. Now, he was the attorney of the plaintiff in the case, had tried it, had been present, substantially, all the time until long after this had occurred, when he refused to appear any longer. We think there was no error in entertaining this motion made orally. The attorney for the plaintiff was present. The defendant was present in person. By their consent, and by their waiver, made orally, they proceeded to hear this motion.

Another objection is made, that the record does not show that the magistrate, in fact, acted upon this; but we understand that

counsel do not seriously question that. The record shows that they appeared from time to time, continued the case, and finally tried it before a jury, and, under the decisions of the supreme court, having done all that, the court must presume that they acted upon that motion, and that the magistrate set it aside. It seems to be well settled that that is the law.

Taking this view of the case, we find that the magistrate did not err, nor did the common pleas err in affirming the judgment, and the judgment of the common pleas is affirmed.

Marvin & Squire for plaintiff; Ingersoll & Williamson for defendants.

**\*REPLEVIN.**

[Cuyahoga District Court, March Term, 1878.]

† WILLIAM BINGHAM ET AL. V. HARRIET E. HILL.

Watson, Hale and Tibbals, JJ.

1. A replevin case being in default, the judgment may, before it is reached for trial, send it to another room, where there is a jury, for immediate assessment of damages without notifying the defendant.
2. Where the verification of a petition in replevin contains all the items necessary in the affidavit for replevin, there being no other affidavit for the replevin, it is not error to hold such affidavit as sufficient to sustain the action.

HALE, J.

It is sought by petition in error in this court to reverse the judgment of the court of common pleas. The action was commenced in the court below by Mrs. Hills to recover the possession of a horse, buggy and harness. The petition is in the ordinary form of a petition in an action of replevin. To it is appended this affidavit: "State of Ohio, Cuyahoga county, Harriet E. Hill, being duly sworn, says, that she is the plaintiff, and that she believes all the facts stated in the foregoing petition are true. She further says, that she is the owner of the property described in the foregoing petition, and that she is entitled to the immediate possession thereof."

She proceeds to state further in this affidavit, each item and allegation required to be embodied in an affidavit upon which the clerk would be authorized to issue an order of delivery.

This petition and affidavit being filed, a summons and an order of delivery for the property, in the ordinary form, were issued, and the sheriff, taking the writs, executed them by serving the summons, taking the property, receiving bail, and delivering it over to Mrs. Hills.

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† Affirmed by supreme court. See opinion 38 O. S. 657.

A motion was made by the defendants to set aside the service of these writs and to strike the petition from the files, upon the ground, first, that the petition had not been verified; second, that no affidavit had been filed. The defendants appeared simply for the purpose of making that motion, and asked for the dismissal of the case, and the setting aside of the service on the grounds named. The court below overruled that motion, and that action of the court is assigned for the first ground of error. The claim is, that we must treat in this affidavit, as surplusage, either those allegations that should be embodied in an affidavit in a replevin suit, or must treat as surplusage such portion of the affidavit as is designed to verify the petition, and because the two are joined together, that one or the other must be inoperative; that they could not be joined in the same affidavit. And we are referred to a case of an attachment in the 9 O. S. Reps., where the affidavit was defective, and where the court held, that a defective affidavit could not be aided by the averments in the petition, nor could a defective petition be aided by the averments in the affidavit. But that is not this case. Section 175 of the code provides, that an order for the delivery of the property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing certain specific facts. Section 106 provides that every pleading of fact must be verified by the affidavit of the party, his agent or attorney, and provides when. Now, we have here in this case an affidavit of the party plaintiff. That affidavit is a verification of the petition. The affidavit contains *every item* that is essential to an affidavit in replevin, and, looking to the affidavit alone, it discloses every fact that is necessary to constitute the two things—the verification of the petition and the affidavit in replevin; and, we have, under oath, the statement of the parties to facts which verify the petition and to facts which entitle her to the delivery of the property. We can not think that we should give force to the technical rule, that because these are not stated in separate affidavits, therefore, the whole proceeding must fall. (That is the first ground of error.)

Another question is made in the case—a question of some difficulty. The defendants, having made this motion, and appearing simply for the purpose of making the motion, chose to rely upon the error that they supposed the court had committed in overruling that motion, and did not answer the petition, the case stood in default of an answer in this court. Pending here, it was assigned for trial in this room on, perhaps, the 16th day of November, or back of that in the general assignment for the term. Counsel for the defendant was present in this room to attend to this case. The court, in this room, was engaged in a case numbered very much less, and between the case upon trial and this case, there were several intervening cases assigned for trial in this room. That being the state of affairs, the judge, presiding in this room, transferred this case to the adjoining room. The attorney representing the

plaintiff appeared there and had a jury empanelled to assess the damages in the case, the attorney for the defendant being in this room at the time, and unaware that the case had been transferred. The attorney for the plaintiff, knowing that fact, went into that room, empanelled a jury, and proceeded to trial. The attorney for the defendant, learning, about the time the jury had been empanelled, that the trial of the case had been started in that room, or accidentally going into the room and learning the fact, protested against the case being proceeded with, and asked the court to discontinue the trial of the case. The court refused and proceeded to the trial, the attorney for the defendant taking part, appearing to cross examine the witness that was produced on the part of the plaintiff.

This matter is brought before the court by the affidavits of the two attorneys engaged in the case. By the general statute cases are to be tried in the order in which they appear upon the docket.

But under the act abolishing the superior court of Cleveland, and providing for five terms of court in this county, a very large discretion is given to the judges of the court of common pleas, and that discretion we are not disposed to interfere with, unless absolutely compelled to do so. It is conceded by counsel, that the statute requiring cases to be tried in the order in which they appear upon the docket, cannot be enforced in this county under the provisions of the statute. It is enacted in the 4th section of this act to which I refer:

"The judges thereof shall have full power to classify and arrange the business therein, and to assign to each of the judges such portion of the business therein as may be thought proper, and the business of said court may be disposed of by all or any number of the judges sitting together or each sitting separately."

Seeming to give a large discretion to the judges to arrange the business for the accommodation of the different members of the court. It is said, on the part of the plaintiffs in error, that there is ample power under this statute for the judges to classify their business and arrange the cases that shall be tried in the different rooms; but, when they have done that, the power to reassign and rearrange is gone, and they can make but one assignment. Perhaps that is stating it a little broadly, but they claim this: that, if a case has been assigned in one room, it cannot be changed to another room until reached for trial in the room where it was first assigned. If we admit that there is authority in this county to take up cases out of the order in which they appear upon the docket, and it was in the power of the court to arrange that matter to suit the convenience of the different members of the court, it, at least, must be discretionary with that court to arrange the business, and one arrangement does not preclude another. In the view that we take, it is so far within the discretion of the judges who had control of this matter, and who were cognizant of all the facts, that we would not be justified in reversing this case on that ground.



It will be noticed further, that this case stood in default of an answer, and the only thing to be done was the assessment of damages. We are unable to see why section 376 of the code has not something to do with it. "If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment, upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof or assess the damages; or may with the like assent, refer the same to a referee or master commissioner, or may direct the same to be ascertained or assessed by a jury."

Now, this case was in default of an answer. There was only an assessment of damages to be made. If this judgment should be reversed and sent back, the only thing to be done would be to reassess those damages. We are referred to a case in the 12 O. S. Reps., where it is said, that it is error for the court to assess damages in replevin without the intervention of a jury. But in that case the issue was made by answer, and the court found in behalf of the defendant. The court, in that case simply say, it was error for the court to proceed, without the intervention of a jury, to assess damages in behalf of the defendant upon the issue joined in that case, and without finding that the defendant was entitled to the possession of the property. So that, as to the claim that the defendants below were prejudiced by not having an opportunity to participate in the empanelling of the jury, upon which they lay considerable stress, they being in default of an answer, and the jury being called simply to assess damages in behalf of the plaintiff, we think, by that failure to answer, the defendants conceded that the plaintiff was entitled to the possession of the property, and, that with the assent of the party appearing, the jury might be empanelled.

But this whole matter was brought before the court, who had cognizance of the case—the two judges, the one who sent it to the adjoining room, and the one who tried it there, and it was so far a matter of discretion, that we are not disposed to disturb the verdict upon that ground.

The only other ground of error alleged is \*that the damages were excessive. The case has been twice tried to a jury. 75 The verdict was the same in both trials, and, while we think it was all that the property was worth, we are not disposed to disturb the verdict upon that ground; and the judgment of the court of common pleas will be affirmed.

Mix, Noble & White for plaintiffs; S. Burke and Geo. A. Groot for defendant.

**STATUTE OF FRAUDS—HUSBAND AND WIFE.**

[Cuyahoga District Court, March Term, 1878.]

†MARGARET CARTER ET AL. V. E. REINHEIMER ET AL.

Watson, Hale and Tibbals, JJ.

1. An oral agreement not to sue on a note for two years, in consideration of part payment of the interest in advance, does not withdraw the agreement from the operation of the statute of frauds.
2. Where the defense to an action is founded on an agreement not to be performed within a year, the answer must show that such agreement was in writing.
3. In an action to recover a debt due the wife, she and her husband may join as plaintiffs, and a joint judgment in such action may be rendered in their favor.

WATSON, J.

This is an action upon a promissory note, dated July 30, 1875, calling for one thousand dollars at seven per cent. interest, payable one year after date to the order of Margaret Carter. The plaintiffs sue as husband and wife, setting out the note and asking a judgment thereon as a first cause of action.

As a second cause of action they set forth a mortgage given by E. and Emma Reinheimer to secure the payment of that note. Luther Moses is also made a defendant. To that petition an amended answer is filed, and it contains three special traverses, and one of the grounds of defense is in abatement. The answer is in these words: "He admits the execution and delivery of the note and mortgage to the plaintiff, Margaret Carter, and that it was duly recorded as set forth in the petition, but denies that the plaintiffs are the owners of said note and mortgage; denies that they are entitled to maintain a joint action thereon against the defendant, and denies that there is anything due the plaintiffs thereon." These are the three traverses.

They are all negatives pregnant. They deny the joint ownership, the joint claim, and deny the right to bring a joint action. For a further defense they say, that after the execution and delivery of said note and mortgage, to-wit: on or about the 14th day of August, 1875, the defendant entered into an agreement with the plaintiff, Margaret Carter, she being the sole owner and in the exclusive possession of the said note and mortgage, whereby, for a valuable consideration, the said Margaret Carter promised and agreed with this defendant that she would extend the time of payment of said note and mortgage for the period of one year from the time they became due as expressed on the face thereof, to-wit: from the 30th day of July, 1876; that the consideration of said extension

†Affirmed by supreme court in Reinheimer v. Carter, 31 O. S., 579. Decision of supreme court followed 34 O. S., 352, 365.

of time was the partial payment, in advance, of the interest upon the said note for one year, to-wit: from July 30, 1875, to July 30, 1876, at the rate of seven per cent. per annum. That, in pursuance of said agreement, this defendant, on or about the 14th day of August, 1875, and at sundry times thereafter, and before the same became due by the terms of the note, paid to the plaintiff interest on said note as aforesaid. The defendant further says, that the time for which said note was extended has not yet elapsed, and that, by reason thereof said note and mortgage are not due. The defendant further says, that in consideration of said partial payment of said interest in advance, and the payment thereafter of interest on said note at seven per cent. per annum, the said plaintiff, on or about the 14th day of August, 1875, further promised and agreed that after the expiration of the said one year extension she would further extend the time of payment of the said note for one or more years if the defendant desired it.

These papers present this condition of facts: That the plaintiff, Margaret Carter, held and owned this note and mortgage at the time suit was commenced; that in bringing the suit she joined her husband with her in the action, and the defendant, in his traverse, goes no further than to deny the right to bring the joint action, denying the joint interest, and denying that there is anything jointly due. He admits the note to be in the sole possession of the plaintiff, and to be the property of the plaintiff. He nowhere traverses her right to sue, and nowhere claims that any part of the note has been extinguished beyond the interest of the year that it had to run after its execution.

It occurs to us that we should not delay this plaintiff in the collection of her note simply because she has joined her husband with her in the action. Admit that she can sue alone, does it make error if she joins her husband with her? The note is due and unpaid. There is no defense set up except this matter in abatement.

It is a contract that cannot certainly be executed within a year. It was made on or about the 14th day of August. The further forbearance was not to begin until the 30th day of July for the year following. It was to run through twelve months from the 3d day of July, 1876. As matter of abatement, then, we cannot regard that, as it is set up, as good, and as binding on these parties. If it was a contract that could be executed, we would hold it good under the statute; but it is a contract that cannot by possibility be executed within a year, for the continued forbearance through the year is the stipulation as it is set up here on the part of this plaintiff Margaret Carter.

In this condition of things the husband is an unnecessary party. Admit that the wife could bring her action alone, is it error for her to join her husband? Is it error if she chooses to give her husband an interest in that note? It cannot, by any earthly possibility, prejudice the rights of this defendant. He could plead in

bar a former recovery just as well in this form of action as in any other. The judgment of the court below is sustained.

J. W. Heisley, S. A. Schwab, J. K. Hord for plaintiff; E. Sowers for defendant.

### HUSBAND AND WIFE.

[Cuyahoga District Court, March Term, 1878.]

E. H. WILCOX ET AL. V. HARRIET ZIMMERMAN ET AL.

Watson, Hale and Tibbals, JJ.

1. In an action against the maker of a note, a married woman, in order to charge her separate estate, the petition must aver that she had separate property at the time the action was instituted, but averring that she had separate property when the note was executed is bad in demurrer.
2. In an action against a woman, the maker of a note, an answer that at the time of making the note and of answering, she is a married woman, the wife of a person named, is not demurrable.

HALE, J.

This is a case upon a petition in error to reverse the judgment of the court of common pleas.

The errors relied upon are:

1. That the court below erred in overruling the demurrer to the answer of Harriett Zimmerman filed to the original petition in the case.

2. That the court erred in sustaining the demurrer of Harriett Zimmerman to the amended petition filed by the plaintiffs.

The action was commenced by the plaintiffs below, and stands here against Harriett Zimmerman and George W. Zimmerman, and is founded upon a promissory note signed by these two defendants. The cause of action is described in the petition in the ordinary form of setting out a cause of action upon a promissory note under section 122 of the code. It makes no reference to the fact that Harriett Zimmerman was a married woman, and, of course, makes no averment that she had separate property which she intended to charge by the execution of this note. To that petition she answered, alleging that, at the time of the execution of the note, and at the time of the filing of the answer, she was a married woman, and the wife of her codefendant George W. Zimmerman. To that answer a demurrer was interposed by the plaintiff and the demurrer was overruled, holding that the allegations of the answer constituted, as to her, a good defense to the promissory note. In that, we think, no error was committed, by the court of common pleas. That demurrer having been overruled, the plaintiff, took leave to amend the petition. The plaintiff says that this cause of action is founded upon a promissory note of which the following is a copy, giving a copy of the note, signed, Harriett Zimmerman and George

W. Zimmerman: "There are no credits upon said note." Then, to meet the defect of the original petition, this averment is made: "That said Harriett Zimmerman, at the time she executed said note, was the wife of the defendant, George W. Zimmerman, and she then had property separate and apart from her husband, and at that time she executed said note with the intention and for the purpose of binding her separate property and the estate for the payment thereof." It will be noticed that the allegation in this petition is, that at the time she executed the note, she had separate property, which she intended to bind by the execution of that note, and for the payment of the note. There is no averment that, at the time of the institution of this suit, she had any separate property.

In the 26 Ohio Reports the supreme court have held, that section 28 of the civil code, as amended March 30, 1874, was not intended to enlarge or vary the liabilities of a married woman, but merely to change the form of remedy. So that her liability, after the passage of the amendment, remained precisely as before the amendment was made.

"Second, no recovery can be had against a married woman upon her promissory note, whether executed before or after the date of said amendatory act, unless it appear that she has separate property subject to be charged therewith."

We suppose that prior to this amendment the separate property of the wife, in a case where her separate property was chargeable, was charged by a suit in equity to charge that separate property. Yet, since this amendment, where the case is made in which the wife's separate property may be charged with the payment of the debt she has contracted, a personal judgment can be rendered; but before that personal judgment can be rendered, the same state of facts must appear and exist that was necessary before the amendment, to charge her separate property; hence, it follows that at the time it is sought to charge the debt contracted by her upon the separate property, it must appear that she had separate property to be charged with the payment of that debt. There is no such allegation in this petition, and in that the petition was defective. The demurrer, therefore, was properly sustained.

Another question, which was somewhat \*discussed, is 76 whether the petition should not also show that the consideration of the note was for her benefit or the benefit of her estate; that the consideration was received by her either personally or for the benefit of her estate before her estate can be charged, or before a personal judgment can be rendered. That precise question, as we understand it, has not been passed upon by the supreme court and it not being necessary to a determination of the questions raised in this case, we do not pass upon it.

The judgment of the court of common pleas is affirmed.

Hutchins & Campbell for plaintiff; Wm. Kidd for defendant.

**ASSESSMENTS.**

[Cuyahoga District Court, March Term, 1878.]

**JAMES KELLEY v. SYLVESTER D. EVERETT, TREASURER OF THE CITY OF CLEVELAND.**

Watson, Hale and Tibbals, JJ.

HALE, J.

The plaintiff in error was the plaintiff below in a proceeding to recover back, the amount of an assessment paid by him for the construction of a sewer on Champlain street.

The court, looking over the record, did not find that it disclosed any good reason why the plaintiff should not pay for the sewer of which he had the benefit or why he should recover back what he had paid.

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**CORPORATIONS.**

[Cuyahoga District Court, March Term, 1878.]

**†JEWETT v. THE VALLEY RAILWAY CO.**

Watson, Hale and Tibbals, JJ.

WATSON, J.

In this case the court requested counsel to make a motion to reserve for the reason as announced.

"That we think a reported decision ought to be made upon the main point involved. We think it will be to the interest of these railroad enterprises and to the interest of the profession to have a reported case upon this point." The case was reserved.

Marvin, Hart & Squire for plaintiff; W. J. Boardman for defendant.

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†For supreme court decision see 34 O. S., 601. The decision of the supreme court has been followed 36 O. S., 1, 10; 39 O. S., 245, 249; 42 O. S., 261, 274; 42 O. S., 549, 553; 47 O. S., 276, 299.

**\*JUDGMENT.**

77

[Cuyahoga District Court, March Term, 1878.]

†MARY LETITIA GIFFORD V. DAVID MORRISON.

Watson, Hale and Tibbals, JJ.

A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct, and the defendant has had actual knowledge of the pendency of the action, unless a meritorious defense to the action be shown

WATSON, J.

This case involves a very simple and a single question.

The plaintiff in error purchased certain real estate which she found after purchase, was subject to a lien upon the judgment of a justice of the peace. That lien was in favor of the defendant in error. It seems that he brought an action against his debtor before a justice of the peace, and process issued on the 28th day of December, made returnable by the justice issuing it on the 31st day of the same month. After the process was issued, a copy was made in its original form by the officer holding it, and then he altered the return day to the 3d day of January, three days afterwards. He returned his process to the court issuing it served. The defendant there received the copy calling upon him to answer on the 31st. What he did on the 31st does not appear. On the 3d of January judgment passed against him by default. The question now arises whether that judgment is void, or whether it is erroneous and may be reversed. We are told that this question has been decided both ways by different branches of the court below.

We take this view of the subject: That when that writ was issued and made returnable on the 31st, and went into the hands of the officer and was by him altered, that alteration being approved by the court, and the case set down for trial on the 3d of January, it ceased to be the act of the officer, and became the act of the court in changing the return day of that writ. The copy was returnable on the 31st. It does not appear what the party did on that day; but we regard it in this light: it was to him a process, informing him that the action had been commenced against him by the plaintiff in a certain justice's court, and that unless he answered, judgment would go against him by default.

—We think that this was an irregularity in the process which he could have corrected. By making his motion in the court, he could have set that service aside and secured any right which was involved in the case, and which would have been prejudiced by holding that a good service. But he did not do that, and a judgment was

†Affirmed with report, 37 O. S., 502.

entered against him. The justice then made up his case as the writ was returned to him altered—the writ having been issued returnable on the 3d of January, and on the 3d of January the non-appearance of the defendant, default and judgment, leaving upon the record no error, and yet we cannot see that that judgment is absolutely void. The defendant was so far a party to it that we cannot treat it as a nullity. We do not think it reaches the nakedness that would authorize that, and that is the view taken of it by the court below, to reverse which this proceeding is brought here. The entry here will be an affirmance of the judgment of the court below.

E. Sowers for plaintiff; Birney for defendant.

### EVIDENCE.

[Cuyahoga District Court, March Term, 1878.]

JOHN H. ISAAC V. ADIN GAUNT.

Watson, Hale and Tibbals, JJ.

In an action for damages for negligence, the issues being the negligence of defendant and contributory negligence of plaintiff, the subsequent conduct of the parties as to whether plaintiff ever complained to defendant of his being the cause of his injury is proper; or if it is not proper it is not prejudicial to the plaintiff and not ground for the reversal of a verdict for defendant.

TIBBALS, J.

Error to the court of common pleas. The errors complained of are, first, the verdict of the jury was against the weight of the evidence; second, error of the court in admitting certain testimony on the trial which was duly excepted to.

The case is as follows:

John H. Isaac, in the month of March, 1864, being a boy of between thirteen and fourteen years of age, entered into the employment of the defendant to operate a certain flax-breaking machine.

78 He avers that \*he was unacquainted with the machine; that the defendant did not properly instruct him as to its management, and that, after operating it a few days, a certain bar connected with the machine, which, he avers, was inserted between two certain rollers for the protection of the operator, broke, and the defendant, knowing it, negligently suffered that machine, in that broken condition, to be operated by this boy without again properly instructing him with reference to the danger; and he says that after operating it a few weeks, without any fault on his part, and by reason of the negligence of the defendant, his hand caught in the roller and his arm was crushed and had to be amputated, and, that by reason of these facts, he has sustained a large amount of damage. The negligence and carelessness of the defendant is put



in issue by him in his answer. The case went to trial before a jury. On the trial the boy testified, substantially to this state of facts; that he had not been cautioned in reference to the dangers of running the machine; that the defendant was aware of its broken condition; that the defendant inserted in the place of the bar a mere rod which left a space of some three-fourths of an inch between the bar and the roller; and that, in operating it, his hand caught in that place. On the part of the defense, the defendant himself was called as a witness, and testified that when he first gave employment to the boy he explained the entire operation of the machine, the proper mode of management, and expressly told him that he must be careful and not get his fingers between the rollers saying to him, as he expressed it, that a machine that would break flax would break fingers. He said that he repeatedly gave him these admonitions; and that upon the morning of the day of the accident, seeing him act carelessly about the machine, with reference to his fingers, pulling the flax by his hands from the machine, he again cautioned him, told him that he must not do it. Other parties were called, who were, perhaps, employes in the establishment, and who testified to seeing these same acts of carelessness on the part of the boy, and that they had warned him of the danger, and that he must be careful or he would injure himself.

This being the state of the proof, the jury readily found a verdict for the defendant. It is claimed that the evidence does not support the verdict, because there is no controversy over the fact that the bar was broken, and that the boy was not cautioned with reference to the use of the machine after that bar was broken.

I think there is considerable controversy over that question; for, if it be true, as the defendant says, that he told him upon the very morning that this accident occurred of the danger, he certainly then knew it. But it is further in proof that the boy himself broke this bar in his operating that machine after running it two days and a half; that he knew that rod was put in there—knew all about it just as well as the defendant could have known it, and was fully instructed as to the manner of managing it, and, especially, that he must not get his fingers between the rollers. We are at a loss to see how the evidence fails to support the verdict. Indeed, the evidence is, substantially, all upon that side of the case. This boy is fully contradicted upon this point. But, if he were not, the evidence clearly shows that the negligence was on the part of the boy, he having full knowledge of the condition of the machine.

This accident occurred in 1864. The suit was brought in 1874. Ten years at least had elapsed after the accident before the suit was brought. The boy had then, of course, arrived at age.

The next error complained of is the admission of certain evidence. The boy, upon cross-examination, was asked if he had ever made any complaint to the defendant. It turned out, as the proof shows, that that was only a matter of hearsay on the part of the boy, and when the defendant went upon the stand they asked

him this question: "What complaint, if any, has the plaintiff ever made to you before the commencement of this suit, as to your being the blame for this injury to him?"

When it is borne in mind that the two issues submitted to the jury were, first, the carelessness or negligence of the defendant, and, secondly, the contributory negligence of the plaintiff; the conduct of the parties is the material point in issue. It is said that that does not prove anything. It is proof of a very low grade, undoubtedly, but we think that in cases of this character it is always competent to give in evidence the conduct of the parties. If this boy had carelessly placed his fingers within the rollers, so that it was his own fault, he was conscience of that fact; he knew that he was the party to blame; and can it be said that it is not, at least, competent evidence tending to show carelessness on his part to prove that he never made any complaint to the party whom he sues. If he had been free from blame, if the carelessness had been entirely on the part of the defendant, naturally, he would have found fault with him; he would have complained; he would have suggested to him that the real cause of the injury was the negligence of the defendant. We are referred, in this connection, to a decision by the supreme court commission: "Evidence must be confined to the issue, and even for the purpose of corroborating the testimony of witnesses an inquiry into facts *entirely* collateral leading to a controversy over matters altogether foreign to the case before the court cannot be permitted." Is this that class of evidence? It certainly was not foreign to the case. They were inquiring of the defendant as to the conduct of this boy, what he had said and done, if anything, on the subject of whether he had made any complaint, or whether he had omitted to do so, leaving the jury to give it such weight as it might be entitled to, in determining the question of negligence on his part. They say "the effect of incompetent testimony once admitted cannot be done away with except by such a charge to the jury as will force them to disregard it completely."

This language must be taken in connection with the repeated holdings that evidence must be to the prejudice of the party before the court will disturb a verdict, where such evidence is permitted to be given on the trial. Harmonize these two propositions, and how can it be said that this evidence, in the least degree, prejudiced that boy. It was a fact admitted by himself, a fact sworn to by the defendant—an unquestioned fact. We are at a loss to see how the boy could, in any way, be prejudiced by this character of evidence. We think there was no error, and the judgment of the court below is affirmed.

John Coon for plaintiff; H. C. Ranney for defendant.

**PARTIES.**

[Cuyahoga District Court, March Term, 1878.]

†HORACE WILKINS V. OHIO NATIONAL BANK.

Watson, Hale and Tibbals, JJ.

Parties who are severally or jointly and severally liable on an instrument may be sued separately although the one sued is a surety only.

HALE, J.

This is a petition in error to reverse the judgment of the court of common pleas.

The action below was founded upon a promissory note for three thousand dollars, payable to the order of the cashier of the Ohio National bank, signed by W. P. Cooke, and indorsed by Horace Wilkins. On the 13th of January, 1877, the Ohio National bank commenced an action on that note against Horace Wilkins. The petition is in the ordinary form to charge an indorser, and asked a judgment for the amount of the note against Wilkins alone. On the 17th of February, 1877, Wilkins answered, first obtaining leave of the court to answer, and to make Cooke, the maker of the note, a party defendant. In his answer he controverts no allegation of the petition, but simply alleges that he indorsed that note as surety for W. P. Cooke, and asks that a judgment be rendered against Cooke as principal and himself as surety. Section 38 of the code provides, "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff." The plaintiff in this case exercised that option. A summons was issued upon that answer and cross-petition, as it is called, requiring Cooke to appear and answer that cross-petition. He is not required to answer the petition of the plaintiff. The cross-petition asks for no judgment against him in favor of Wilkins, simply asks that he be brought in, and that a judgment may be rendered in a particular way against Wilkins.

The court below, with this state of facts before it, simply rendered a judgment against Wilkins as prayed for in the petition, leaving the rights of the two defendants to be determined thereafter. In that we can see no error. We do not see how it was in the power of this defendant to prevent a judgment being rendered against him in accordance with the prayer of the petition. It was within the plain provisions of the code. The judgment of the court below is affirmed.

J. I. Nesbit for plaintiff; Henderson & Kline for defendant.

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†Affirmed with report, 31 O. S., 565.

**\*HUSBAND AND WIFE.**

[Cuyahoga District Court, March Term, 1878.]

Watson, Hale and Tibbals, JJ.

**MOSES ROSKOPH v. JOHN G. COATES ET AL.**

In a petition against a husband and wife on an account, it is necessary, in order to have judgment against the wife, to aver that she intended to change her separate property and that she is possessed of separate property.

**TIBBALS, J.**

This case was heard and submitted to the court on a petition in error to reverse the judgment of the court of common pleas. The error assigned and relied upon was the sustaining by the court of a demurrer to the answer of the defendant below.

The case is briefly this: On the 10th of May, 1871, the Commercial Mutual Insurance company, insured a certain schooner called the John Burt in the sum of \$20,000. On the same day the Detroit company reinsured to the plaintiff this same property in the amount of \$5,000. The property was lost during the life of the policy. The petition avers that the plaintiff became liable for the payment of the sum of \$20,000, stated in its policy. It avers further that the defendant, having reinsured the plaintiff upon this same property in the sum of \$5,000, is liable for that sum. The answer of the defendant admits the assurance by the Commercial Insurance company to the amount of \$20,000, the destruction of the property, and its liability for that sum; but the defendant, for a further answer, says that "the plaintiff has never paid said last named sum to the said assured, who is, as the defendant is informed and believes, one P. J. Ralph, of Detroit, in the state of Michigan. On the contrary, the plaintiff, though not in a condition of insolvency or bankruptcy before the commencement of this action, settled and compromised with the said assured his said claim of \$20,000, under said policy, for the sum of sixty per cent. on said last named amount, and for no more, to-wit: for the sum of three-fifths of the amount insured by the plaintiff on the said vessel in and by said policy, and said claim of said assured was thereby fully satisfied and discharged; and the defendant thereafter, in accordance with the terms of said settlement and compromise, and in full satisfaction and discharge of all claims against it by reason of the loss of said vessel under said policy by it issued to the plaintiff, paid to the plaintiff \$3,000, to-wit: sixty per cent. or three-fifths of the sum insured on said vessel in and by said policy issued by the defendant to the plaintiff; wherefore it asks to be dismissed."

To that answer a demurrer was interposed and sustained by the court below.

It is claimed by the plaintiff in error that the court erred in two particulars. First, it is said that this answer is in accord and

satisfaction of that claim of the Commercial Insurance Co., against the Detroit Fire Insurance Co. The answer is objected to upon the other side for the reason that it is not sufficiently averred that the payment of the \$3,000 was an accord and satisfaction. The parties was originally liable for \$20,000. They settled and paid \$12,000. The answer avers: "Thereupon the defendant paid the same proportion (sixty per cent.), to wit: \$3,000, in discharge of its liability for \$5,000."

Now, first, are these averments sufficient? I think it cannot be doubted that, to maintain a claim of this kind—an accord and satisfaction—there must be a mutuality of understanding between the parties. The amount must not only be paid by the debtor, but it must have been received by the creditor as an accord and as a satisfaction. We are cited to a case in the Cincinnati Superior Court Reporter upon that subject. That was a debt incurred in a gambling establishment for the sum of \$2,500. The answer interposed, first, a general denial; then it said, "the other defendants answer and make a general denial of the facts alleged," and afterwards set up, as another ground of defense, accord and satisfaction. With regard to the last ground of defense, the paper on which it is claimed accord and satisfaction can be predicated is a receipt signed by the plaintiff for \$100 "in full of all claims against Stone, Wyatt & Crout, especially in full of all claims lost by me at the game of faro at their house, 202 East Fourth street."

The court, in that case, say: "Formerly the rule was regarded with great rigor; that, if one owed another, by contract or otherwise, a large sum of money, the acceptance of a smaller sum would not be regarded as evidence of satisfaction: but that rule has been very much relaxed in modern times. The rule now is to ascertain the intention of the parties—whether they voluntarily came together; that there was no fraud, and no advantage taken of one by the other. It seemed to the court the principle will apply in this case as in any other. The acceptance of a smaller sum in discharge of a greater, where the parties stand on equal terms, is regarded as satisfaction."

Now, it clearly appears from that case that the parties united in that compromise. Not only was the sum of \$100 paid in full satisfaction, but it was accepted; it was received and receipted for by the creditor in full satisfaction.

What have we here? We have nothing save this: first, the averment that they compromised their \$20,000 for \$12,000; and, upon the legal theory that that operated to the benefit of the reinsurer, they paid the same proportion in full satisfaction; but there is an entire failure to aver that the party received that with the same understanding on their part. There is no averment that the parties, in the language of this case, "intended to accept this in full satisfaction." For aught that appears, it may have been simply to be paid upon an \*account—balance to be paid at any time. We are very clearly of the opinion that this answer does 82

not contain averments sufficient in that respect to be sustained. It was claimed and asked by counsel that they ought to be permitted to put in other proof. But you can only prove what you aver; and if you prove every fact you have averred, you are still short of making a case; and, if that be so, the answer is defective.

The next question presented is more especially a question of law: That this second insurance—the reinsurance—is a mere matter of indemnity, and that they are entitled to the same reduction in the amount of the loss that the original insurer obtained.

Now, is that the law? That it is a contract of indemnity cannot be questioned. It sustains that relation. The original party insures the property. They ascertain that they have a greater risk than they are willing to run, and they seek another company to share it with them as an indemnity. Now, what is the contract of this reinsurer? It was, "We will pay your loss to the amount of \$5,000 if you sustain a loss to that amount." It is claimed that that is not the terms of the contract, and the leading authority cited is the case of the Illinois Mutual Fire Insurance company v. The Andes Insurance company. There the policy was first issued upon the property for the sum of \$6,000. Another company reinsured the insurer in the sum of \$2,000, and a loss occurred. The first company adjusted it by the payment of \$600, ten per cent., and brought their suit to recover the entire \$2,000 of the other party—not only the full sum of their indemnity, but more than their actual loss. Now, the court say: "The questions are: Shall the reinsurer recover the full \$2,000 or only \$600, or a *pro rata* part of the latter sum? Now, this last question is raised upon the fact that the policy contained the stipulation: 'Loss, if any, payable *pro rata* at the same time and in the same manner as the reinsured company; in case of a loss to reinsure, etc.'"

Now, it is argued that that stipulation is to be omitted, and that the law itself provides that they only pay a *pro rata* proportion. We think this court did not take that view of it. The court say: "Notwithstanding, then, the adverse authority that is to be found"—and they discuss it very clearly—"we are disposed to hold, on the principle, as we regard it, that \$600, the sum paid by the reinsured company in discharge of its liability for \$6,000, was the actual loss it sustained, and the extent of the recovery which should be had. And in view of the following special clause in this policy of reinsurance, we are of the opinion that the recovery in this case should be reduced even below that sum. The clause is this"—which I have just read—"Loss, if any, payable *pro rata* at the same time and in the same manner as the reinsured company." The only construction we can well put on this clause and give it practical effect is this: that the Andes Insurance company, the reinsurer, was only to pay at the same rate as the Illinois Mutual Fire Insurance company, the reinsured, could pay; and, as the latter company paid only ten cents on the dollar of its insurance, the for-

mer company is only liable to pay at the same rate—that is, ten cents on the dollar.”

Now, it was argued that these two policies of insurance ran hand in hand together; that they were both of them really an insurance on the property. That is true. But there can be no privity between the insured and the reinsurer. Suppose the Commercial company had become wholly insolvent, could it be claimed for a moment that an action would lie directly by the owner of this property upon this policy of reinsurance? Clearly not. He had made no contract with it. They had made no undertaking to him to insure that property. It could only be reached as assets belonging to the Commercial Mutual Insurance company. It was simply, then, an undertaking on the part of this company. “You having insured to the amount of \$20,000, we will indemnify you in any sum you may lose, not exceeding \$5,000.” They lost \$12,000, and paid it. How can it be said that this defendant should be permitted to reduce his \$5,000 when the plaintiff has been subjected to that loss, and should be indemnified to the amount of \$5,000, according to the terms of the insurance. We regard this as merely a matter of contract between the parties; that the reinsurer assumed to pay and indemnify to the amount of \$5,000 if the original party lost that amount or more. The answer admitting that fact, we are unable to see upon any principle of any of these authorities why he should not recover the entire \$5,000.

The judgment below will be affirmed.

E. J. Dickman for plaintiff; Ingersoll & Williamson for defendant.

### DECLARATIONS AND ADMISSIONS.

[Cuyahoga District Court, March Term, 1878.]

GEORGE MILLS AND ROLLIN C. DEWITT v. E. GRASSELLI AND C. A. GRASSELLI.

Watson, Hale and Tibbals, JJ.

In an action for damages caused by the negligence of defendant in hitching a fractious horse in his delivery wagon, a question as to what the driver said regarding the character of his horse, to which he replied that he had a “green” horse is not competent, as such declaration of a mere agent is not part of the *res gesta*.

WATSON, J.

In the case of George Mills and Rollin C. DeWitt against Eugene Grasselli and Caesar A. Grasselli, the plaintiffs bring their action against the defendants for negligence in delivering sulphuric acid. The acid was contained in a vessel, or a number of vessels, that they call a carboy, the form or proportions of which I am uninformed of; but it was something made that was regarded as suffi-

cient to keep and contain sulphuric acid. It is alleged that in delivering this acid the defendants used and employed unsuitable and fractious horses, and, by reason of the unmanageableness of the horses so employed by the defendants, and of the incompetency negligence, carelessness and improper conduct of the driver employed by the defendants to manage and control said horses, a carboy containing said acid was broken, and the acid was spilled and ran upon the goods and property of the said plaintiffs, and thereby damaged a portion of the stock of goods of the said plaintiff to the amount of \$563.10.

Now, the evidence in the case is set out; and after evidence being given that these carboys of acid were sent in a wagon under the charge of a driver, it was made to appear to the jury that the horses started; that they moved up from the platform some feet, and, being reined up and backed down again to the platform, that they came against the timbers of the platform, which it is said jarred the house. It appears that they were backed up to the platform where there was a platform scale or scale for the purpose of weighing it; that this acid was taken in these vessels at the tail gate of the wagon; that the driver shoved them down to the tail end of the wagon, and they were there taken by the agents of the persons to whom they were contracted and to whom they were to be delivered. They were the Non-explosive Gas Light company, of this city, and the plaintiffs are to bacconists, or, at least, dealers in tobacco; that his stock is below these platform scales; that, after taking off some of these carboys, one was taken off that was broken; it was put upon the scales and shoved across, and then on to the platform to be shoved right to the point where it was to be taken down stairs, and after being taken off the wagon it was discovered to be broken, and the acid commenced discharging from the vessel, and discharged very rapidly, ran through and damaged the stock of tobacco of these plaintiffs.

Well, after these facts had been shown, this inquiry is made of one witness: "What, if anything, did the driver say at the time as to the character of his horses?" The question was objected to by the defendants' attorney, the objection was overruled, and to that the defendants excepted, and the question was answered, "The driver said he had a green horse in the team." This was again repeated by another witness. "Question by plaintiff's attorney: What did the driver say as to the character of his horses on that occasion? (Question objected to by defendants. Objection overruled, and excepted to by defendants.) Answer: The driver remarked that he had a green horse."

Now, this evidence was given to sustain the allegation that the defendants were guilty of negligence in putting an unsuitable horse in that team. The precise ground upon which it was expected that this testimony should be received is not exactly apparent. We infer, however, by the form of the question, that it was claimed to be a part of the *res gestae*, for the question is, "What did the driver



say at the time?" We infer that that was what the parties meant in asking the question.

Now, we are not able to perceive how this could become a part of the *res gestae*. It was nothing explanatory of the act. It was nothing in regard to what had transpired there. It was in relation to another thing, and a wholly distinct thing, from what had transpired there; it was the character of one of the horses in that team. In regard to that matter this driver was a competent witness, and, if what he had to say on that subject was material, he should have been put upon the witness stand, where the opposite party would have had the benefit of testing him by a cross-examination. We can perceive no principle upon which his statement there could be given in evidence. Surely what he said as an agent, relying upon the remark as the remark of an agent, would not admit the testimony. We can perceive nothing that so connects it with the transaction as to make it a part of the *res gestae*, and this evidence being directly to the point at issue, we are to presume that it had its effect to prejudice the case as to the defense before the jury. We come to the conclusion that this was error in admitting this testimony, and, for that reason, we reverse this judgment and remand the case to the court below for further proceedings.

There are further questions raised here as to the instructions; but, being entirely satisfied, and being unanimous upon this question, we do not suppose that it is necessary for us to express an opinion upon any point beyond it, and for this reason the judgment, will be reversed and the case remanded.

R. F. Paine and J. J. Curran for plaintiffs; M. R. Keith for defendants.

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### \* EXECUTIONS.

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[Cuyahoga District Court, March Term, 1878.]

†S. H. BENEDICT ET AL. V. JOHN H. DECKAND.

Where a levy of execution is made by a sheriff on a stock of goods belonging to a judgment debtor, and subsequently a constable levies on the same goods, subject to the sheriff's levy and with the sheriff's consent, such second levy is good.

HALE, J.

This was a proceeding in the court below for the distribution of funds arising upon the sale of certain property upon executions, and it comes into this court upon a petition in error. The facts connected in the case are these: Deckand was engaged in mercantile business of some kind in this city. At the September term of the court of common pleas, Boyd, Mowry & Co. recovered a judgment against Deckand. At the November term of the same year John B. Stetson recovered a judgment against the same party.

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†For common pleas decision reversed by this opinion, see 1 B , 354.

At the January term of 1876, S. H. Benedict & Co. recovered a judgment against the same party. At the same term Williamson, executor, obtained two judgments against the same party. Gould, Devenport & Spalding in January, 1876, covered a judgment before a justice of the peace for \$180 against the same party. Those were the judgments. Benedict & Company on the 8th day of January, having a judgment for some \$400, caused an execution to be issued upon that judgment, and a levy to be made upon a stock of goods which afterwards sold for something like \$1,100. And the sheriff, under that execution, took possession of the goods and held them until the 18th day of January, when an execution was issued upon this judgment rendered before the justice of the peace in favor of Gould, Davenport & Co. That execution was placed in the hands of a constable, who went to the store where the goods were, and made a levy upon the goods subject to the levy that had been made by the sheriff; and we find, as a question of fact, that that was done with the consent of the sheriff. Affidavits were taken, in which the constable and sheriff both allege that it was by an amicable arrangement between them that that levy was made, they agreeing that the same auctioneer might sell, and when the first execution was satisfied that the residue should go into the hands of the constable for the execution that he held. It was by the consent of the two officers that the levy was made in that way.

The first claim made is that this levy by the constable is absolutely void, for the reason that the property was in the hands of the law; that being held by the sheriff upon an execution, it was in the custody of the law at the time the constable undertook to make this levy, and being in the custody of the law was not subject to a levy upon an execution held by another officer.

The general proposition that property in the custody of one officer, held by him upon an execution, cannot be levied upon to satisfy an execution in the hands of another officer, is, perhaps, well settled. There is no question about that general proposition of law. But it is claimed that by the consent of the officer holding the property under the first execution that that may be done, and we having found, as a question of fact, that that consent was given, the question is fairly presented whether that consent takes it out of the general rule.

Now, by the statute, when two executions come into the hands of the same officer he may levy upon and hold the property to satisfy the two executions. We are unable to find very much authority upon this point. There is a case in the 1st of Disney, the reasoning of which satisfies us that it is in accordance with justice and equity, at all events. After reciting the general proposition I have referred to, that two executions may be levied by the same officer, the judge, in delivering the opinion, uses this language: "So, where the officer thus having the goods in his possession consents or submits to a levy upon another execution, or an attachment subject to his title, and to hold the goods as trustee or bailee for

the other, after satisfaction of his own execution, there is no conflict or collision of authority;"—that rule being that the one officer cannot levy because it creates a conflict of authority—"and there is no more reason, in law, why such second execution or attachment may not be levied with his assent, than if it had been in his own hands for that purpose. This rule has been adopted at special terms by two of the judges of this court, in the case of different executions held by different officers, and I cannot perceive why it may not, with equal propriety, be applied in a case like the present"—the precise question presented here, the case here upon executions.

Now, there is a case in the highest court of Kentucky, in the 4th B. Monroe, that fully sanctions the doctrine here laid down. We think, in the absence of any other authority, and looking to the justice of the case, that we are justified in following the decision of the highest court of a sister state and the principles laid down in the 1st of Disney, and in holding that this levy made by the constable was a good levy.

The next question presented is this: It will be observed that two of these judgments were taken prior to the January term, 1876, and that the judgment of Benedict & Co., upon which the first execution first issued and the first levy made, was obtained at the January term of 1876. The levy was made on the 8th day of January. Williamson, as executor obtained a judgment on the 19th of January and caused an execution to be levied upon this same property, and to be placed in the hands of the same sheriff. Before the Williamson executions were levied upon the property the execution in the hands of the constable that we have been discussing was levied upon the property in the manner we have indicated, and two executions had been issued upon the judgments that were rendered at the September and November terms, so that between the Benedict execution and the Williamson executions three levies had intervened. Now, the question arises as to the distribution of these funds under these circumstances. The Benedict execution is prior to all of the others. The three intervening judgments have priority over the Williamson executions.

By the statute judgments rendered at the same time have no priority, must prorate, and we are called upon to make a distribution under that state of affairs. The statute reads: "Where two or more writs of execution against the same debtor shall be issued during the term in which the judgment was rendered, or within ten days thereafter, and when two or more writs against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs, and if a sufficient amount of money be not made to satisfy the execution, the amount made shall be distributed to the several creditors in proportion to the amount of their respective debts."

Now, the order below was, the Benedict judgment being ahead, enough should be set apart to satisfy that judgment. Then the

three intervening judgments, ahead of the Williamson judgments, take the residue of the fund. The two Williamson judgments are brought over and prorate with this fund that was set apart to pay Benedict. What was the result? Benedict & Co. levy an execution upon this property amounting to some \$1,100. They had property sufficient to satisfy their judgment if no judgments had intervened—sufficient to pay both their judgment and the Williamson in full. Now, as to Benedict & Co., those intervening judgments have no claim upon this property. Suppose you treat this as a fund of \$1,100. Benedict & Co. had four hundred and some odd dollars necessary to satisfy their judgment. That left a surplus of five or six hundred dollars. How is that taken away from the Williamson judgments? Manifestly, by the intervening of these other judgments that as against Benedict & Co. are subsequent, and upon principles of equity we should say. That Williamson being defeated by the fact that these intervening executions are levied upon this property, and they taking this surplus that should otherwise come to him, should not be to the prejudice of Benedict & Co. We all understand that in the case of mechanic's lien that the contractor and those who furnish materials and labor for the erection of a building all stand upon an equal footing, and they prorate if there is not sufficient to pay them all.

Now, in the O. S. Reports there is this kind of a case: one mechanic had furnished materials and labor for the erection of a building, then a mortgage was put upon the premises, and after that another mechanic furnished materials and labor. Those two mechanics, as between themselves, would prorate as to the fund that arose from the sale of the property, but a mortgage intervened between them. The court did not in that case set apart a fund sufficient to pay the first mechanic and then pay the mortgage, but held the first mechanic should be paid in full and then the mortgage, and if there was anything left it should go to the last mechanic.

Now, we are satisfied that this statute only goes to fix the lien; that the object of the statute is to fix the lien as between the two executions that issued at the same term, and that these intervening executions coming in to take up the property that you can not apply this statute in the sense it was applied in the court below. We are referred to a case in the 26th O. S. Reps. where this state of facts arose: a mortgage had been executed upon certain premises and then a mechanic's lien was put upon the same premises, and then a defective mortgage was made upon the premises, then judgments taken. As against those judgments the debtor was entitled to a homestead; as against the defective mortgage he was not, and the court set apart \$500 as against the judgments for the benefit of the judgment debtor, but they held that that fund thus set apart as against the judgments to the judgment debtor should go to the mortgagee of the defective mortgage, it being good as between the parties. There was a claim made between the debtor and the cred-

itor; it was not an adjustment of liens between the lien holders, and we think the principles laid down in the 2d O. S. Rep. are applicable to this case, and the order of distribution will be to pay Benedict & Co. \*their entire judgment, then the intervening judgments in the order in which the levies were made, and 84 whatever remains to be paid upon the Williamson judgments.

Mix, Noble & White for plaintiffs; McKinney & Caskey, Prentiss & Vorce, Prentiss, Baldwin & Ford, C. D. Everett, J. H. Hord, S. E. Williamson for defendant.

### DAMAGES—SALE OF LIQUORS.

[Cuyahoga District Court, March Term, 1878.]

HENRY SHAFER v. ELIZA J. PATTERSON.

In an action for damages brought under what is known as the Adair liquor law, the jury in assessing exemplary damages may at the same time consider the allowance of reasonable counsel fees for plaintiff.

WATSON, J.

The plaintiff in error claims that the court below erred in two particulars—first, in charging the jury; second, in overruling a motion for a new trial. A single question only is involved as to the charge of the court to the jury.

The action was brought under what is popularly known as the Adair law, and the judge gave what we regard as a very ample charge upon the question of allowing attorney's fees and upon the subject of exemplary damages, and if we were going to write that charge upon that particular department of the law, I seriously doubt whether there is a member of the court could make the slightest improvement on it. It was, to say the least, very clear, very explicit, and one under which the jury could not easily fail to reach a correct conclusion. That statute gives to the jury the right to assess exemplary damages. It is not a question for the court to dictate as to allowing exemplary damages. The court below gave to the jury very ample instructions as to the manner in which that power should be exercised in view of all the circumstances attending the case, as well those mitigating the act as those aggravating the act, and it empowered them—told them they were authorized under the statute, in view of all the circumstances, to assess exemplary damages, and they assessed damages to the amount of \$315. Of that the defendant in the court below complained, and seeks in this court a reversal of the judgment upon the ground that the court erred. Special instructions were then asked: "The defendant, by his counsel, then requested the court to charge the jury that, if on consideration of the case they determined to assess exemplary or punitive damages against the defendant, that the expense of the plaintiff's counsel in the case was not to be consid-

ered or taken into account in estimating or assessing punitive damages.

Now, in a case where punitive damages may be assessed by a jury, the supreme court decide in the 10th O. S. in the case of Roberts v. Mason, that they may take into consideration counsel fees. As the court lays down the doctrine in that case they take it into consideration as competent evidence. There is nothing in conflict with that decision in that charge, and we think it is ample and in strict accordance with the judgment of the court in the case of Roberts v. Mason. This particular instruction is asked and the court simply say they do not further desire to instruct the jury upon that subject. We think they really had said all they were required to say, and all that was desirable to say, and we find no fault with the charge upon that ground. The other depends upon that and falls with it. We affirm the judgment.

J. W. Heisley & S. O. Griswold for plaintiff; Hutchins & Campbell for defendant.

### STREET ASSESSMENTS.

[Cuyahoga District Court, March Term, 1878.]

E. W. ANDREWS v. F. W. PELTON ET AL.

Where a village, while making a street improvement is annexed to a city which completes the proceedings the city can assess the annexed proprietors to the same amount that it could other citizens, and is not limited to the amount that the village could assess.

LEMMON, J.

This action comes into this court by appeal from the judgment of the court of common pleas. The appeal is taken by the defendants. The case, as originally commenced, is one in which a petition is filed to restrain the collection of an assessment upon premises now situated in the city, and which the petition avers were without the corporation of the city of Cleveland at the time of the filing of the petition and commencement of the action. The petition proceeds to aver that the assessment was made for an improvement upon a street abutting upon and near the premises, ordered by the authorities of the village of East Cleveland, that while they were proceeding to make this improvement these premises, including the territory so improved, were annexed to the city of Cleveland, and that subsequently the city of Cleveland, by its proper authorities, proceeded to levy an assessment for the cost and expense of making this improvement upon the premises described in the petition; and the petitioner complains that in levying this assessment they levied a larger sum than that which the authorities of the village of East Cleveland could have levied for the improvement so made. The petitioner claims that the improve-

ment having been made under legislation put in force and carried through in the village of East Cleveland, the rights of these property owners were fixed; that they could not be assessed for the improvement more than 25 per cent. of the duplicate value of the property, nor more than ten per cent. of the cost of the improvement. It is admitted, I believe, however, by the petitioner and by all parties concerned, that under the law as it stood at the time this assessment was made, if this property is not to be distinguished from other property in the city of Cleveland, if, in short, the improvement had been made by the authorities of the city of Cleveland whilst this territory had been within the city, the assessment made in this case would have been a legal assessment.

The question thus presented is, whether the proceedings by which this territory, including this improvement, became annexed to and a part of the city of Cleveland, pending the improvement and before the assessment was made, gave to the city authorities power to assess this as they would any other property improved within the city of Cleveland.

We are informed that the other branch of this district court passed upon this question at the last term of court held here, and that they held that an assessment made by the city of Cleveland upon property annexed, in a case presented to them from East Cleveland like this in all respects—that the only authority which the authorities of the city of Cleveland had to levy an assessment were those which were given to the city, and that the assessment must be levied in pursuance of that authority, and that only; that no rights existed in these parties other than such as belong to all other citizens in common in the city of Cleveland; they came in here in all respects the equals of other citizens of Cleveland, and subject to the same liabilities and obligations; we think that a correct rendering of the law. We must, therefore, dismiss the injunction and the appeal.

S. O. Griswold for plaintiff; Heisley and Weh for defendant.

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#### \*APPEALS.

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[Cuyahoga District Court, March Term, 1878.]

JOHN P. HUMPHREY v. ANDREW BERCHTOLD ET AL.

A memorandum of the judge on his calendar of notice of appeal, in which the amount of the bond was never fixed, is not a notice of appeal on the records and hence must be dismissed.

TIBBALS, J.

This case is submitted on a motion to dismiss the appeal.

Two grounds are set up as sustaining that motion:

First, That no appeal was perfected to this court.

Second: That the action is not an appealable one.

The action was brought upon a note and mortgage against husband and wife. Other parties were brought in, who filed answers and cross-petitions seeking affirmative relief. On the 31st of March, 1877, the last day of that term of the court, there being no issue made by the principal defendants in any form, the matter was submitted to the court on default, a judgment rendered for the amount due on the note, and an order foreclosing the mortgage.

It seems that at that term, and on that day, a mere notice was entered upon the court calender by the judge of an intention to appeal, fixing no amount of the bond at all. Thereupon the case was continued as to the defendants. At the next term a decree was rendered, on default, in favor of those codefendants, reciting and determining the liens between the parties. After that, but still within thirty days of the adjournment of the other term of the court, the party put in his bond, the clerk approving it; and it is said that that does not bring the case into this court.

The statute provides that the party, at the time the judgment is rendered, shall enter upon the records of the court notice of his intention to appeal to the district court, and the court shall fix and determine the amount of the bond to be given. Thereupon, within thirty days, the party desiring to appeal may give his bond in accordance therewith. Now, first, the court never fixed and determined the penalty of the bond at all. Second, the record of the court nowhere shows anything on the subject. There is simply a memorandum of the judge upon his calendar.

It seems very clear to us that the law has not been complied with in that case; that that case has not been appealed into this court. Such an entire failure to comply with the positive provisions of the statute certainly results in a failure to appeal the case to this court, and renders it entirely unimportant to determine whether the action is an appealable one or not. The motion to dismiss the appeal is sustained.

Groot & Blandin, for plaintiff ; M. Rogers, for defendants.

### ERROR—EVIDENCE—JURY.

[Cuyahoga District Court, March Term, 1878.]

JOHN HUTCHINS ET AL. V. PAUL WICK.

1. In an action on a *supersedeas* bond executed in behalf of one of the defendants, such defendant cannot set up that he has a right of action against his codefendants of the original case to compel them to satisfy the original judgment.
2. Where the assignment of a judgment is attested by a witness, who is a nonresident, it is not necessary in proving the ownership of such judgment to prove it by a deposition of such witness, as other proof is admissible in such cases.
3. Where a party demands a struck jury and the clerk served the panel on the parties and notified them of the time to strike, and they failed to strike during the term, such neglect waives that right, and it is too late to claim it at the trial of the cause at a subsequent term.



TIBBALS, J.

To properly understand the question raised in this case, a brief history of the litigation between these parties should be stated. At the March term, 1872, of the Ashtabula court of common pleas, suit was brought by Hugh Montgomery and Ross Montgomery against Thomas L. Bane, B. S. Decker, Theodatus Garlick and Wilmot H. Garlick, charging all those parties with the perpetration of a fraud upon the plaintiffs in the sale to them of certain copper stock known as the Lone Rock Mining company. Pending that suit Thomas L. Bane died. His wife, as executrix, and his son, as executor, were made parties, and the case proceeded to trial and judgment against all the parties. Wilmot H. Garlick gave a *supersedeas* bond for the purpose of taking the case to the district court and having it there reviewed, as did also others of the defendants in different actions. The judgment of the court of common pleas was affirmed in the district court. Thereupon, in due time, suit was brought upon a *supersedeas* bond given by John Hutchins and W. H. Seltzer in the superior court of Cleveland, and it finally got into the court of common pleas; and it is upon the trial of that case, brought upon that bond, that the \*questions of error have been made and presented. 90

The first is: the court erred in striking out certain portions of the answer.

I should have stated that that judgment was assigned to Paul Wick, who brought suit upon the bond. An answer was interposed denying that Wick was the owner of the judgment. They then proceeded to set up substantially this state of facts: that, although the judgment was entered against all those parties, in point of fact, the fraud was perpetrated by Thomas L. Bane, deceased, and by B. S. Decker, and that, in fact, Wilmot H. Garlick had a right of action against them for contribution; that it was a fraud as between him and them, and had a right to have those parties satisfy that judgment, and he undertook this suit upon the *supersedeas* bond and interposed that defense; and among other things, in his answer, he set out substantially that Wick, not being the real party in interest, was in reality prosecuting that suit for and on behalf of the estate of Bane, deceased—of the executors. The court struck that out, holding it to be irrelevant and immaterial, and as part of the future holding in the case that that could not be interposed in that case. For reasons, which we will give in reaching that branch, we think the court did not err in striking that out.

The next question made was a denial to the party to having a struck jury, which is charged as error. The bill of exceptions shows this state of facts: At the term preceding that when this case was tried, the defendants had filed their precipe with the clerk for a struck jury. The clerk had notified the parties, served the panel upon them, and fixed the time it was to be struck. At that time the clerk testifies that at least one of the parties was not present.

He is unable to say which party was not there, but knows that one was not.

It is insisted that the clerk should have proceeded to strike the jury. Possibly that would be so, if it were material. That undoubtedly is the law. The clerk should proceed to strike the jury; but it seems that the case was not reached at that term at all, but was continued without any striking of the jury by either party. On the 12th of January following, when the case was reached for trial for the first time, the defendant insisted upon his right to have the case postponed, that he might then strike a jury and have it summoned, claiming that the old precept was in force and it was the duty of the officer to strike the jury, and that that jury would, of course, have been continued with the case. The law provides, in the case of struck juries, if the case is continued they may continue the jury. But this does not reach that condition. There was no jury struck, and we think it fairly inferable from the record that the parties waived the right to have a struck jury, and the case was continued without any effort to get it, the case suffered to go to the day of trial. It then became too late to insist upon having a struck jury. The court ruled properly in denying him a continuance for that purpose.

Another ground is that the court erred in admitting the assignment of the Montgomery judgment to the plaintiff, being witnessed by Ezra Montgomery, with what they call secondary proof, they claiming that they should have the testimony of the attesting witnesses. Undoubtedly that is the rule, but the record discloses that this witness was out of the state—lived out of the state. It is claimed that they should have taken her deposition. It is questionable whether it is necessary at all to prove, in this case, a simple assignment of the judgment by the attesting witnesses, but if it were so, we hold the exception to the rule, where the party is out of the state, that character of proof is not required—that this instrument be sent on there for identification, and to be attached to the deposition for that purpose. We think there was no error committed by the court in that regard.

Another error assigned is the conduct of one of the jurors. It seems that during the argument upon some legal question, one of the jurors left his seat, and taking a seat in the court-room, in the presence of the court, had some conversation with some person. There is no showing at all that there was anything improper in that conversation, or that it was with any person at all connected with the case. For aught that appears it may have been some mere casual conversation—the sending of some information to him, which very commonly occurs. Nothing is more frequent than for the court to permit a person to speak to a jurymen during the trial of a case. To hold, without any sort of showing, that this party was injured by the mere fact of the jurymen leaving his seat, right in the presence and in the eye of the court, and engaging in a little

whispered conversation, we think, certainly ought not to be sustained as error, and there was no misconduct in that regard.

The next point is as to the execution under the agreed statement of facts, and that raises the real and only question of any importance there is in the case. The agreed statement of facts set up the proceedings in the Ashtabula trial, and it was undertaken to get into this case the defense that Wilmot H. Garlick had a right of action against his codefendants and that Wick was not the owner of the judgment. That was fairly submitted to the jury, and found by them that he was. On the other branch of the defense—that he might in that, as against either the plaintiffs in that judgment or their assignee, interpose that defense and settle the rights between those parties—the court ruled was entirely incompetent in that case, and we certainly must affirm the ruling in that respect. He has his right of action, if he ever had any, at this time against those parties. Certainly the plaintiffs had a right to their execution against any or all of those parties; had a right to transfer that judgment to any one else who succeeded to that same right, and could collect that judgment from any of them.

Whatever were the rights of these parties, as between themselves, we are very clear there was no error committed by the court, and, therefore, affirm the judgment.

John Hutchins and J. E. Ingersoll for plaintiff; M. B. Gary and Geo. S. Kain for defendants.

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### ERROR—CONTRACT—JUDGMENT.

[Cuyahoga District Court, March Term, 1878.]

HARRIETTE KECK, EXECUTRIX, ETC., V. N. D. JENNEY.

1. In an action by a vendee of real estate for a rescission and judgment for the purchase money paid, and the vendor dies after judgment, his executrix is the proper person to prosecute error to such judgment.
2. A vendee who seeks to rescind a purchase of certain property of which he has had the sole use, must offer to account for the use and what he has consumed.
3. A vendee paying the rescission of the purchase of property after having used it a year, and the return of the payments, cannot have a judgment by default without inquiry of damages, both as to what he paid and what defendant is entitled to have restored to him.

WATSON, J.

This is a petition in error to reverse the judgment of the court of common pleas. The action was brought by the plaintiff below, the defendant in error in this court, asking for a rescission of a certain contract for the sale of a few acres of land and a stone quarry and mill thereon, for the purpose of quarrying and cutting stone. Harriet Keck, one of the plaintiffs in error, was the wife of Garrett Keck, the defendant below. The plaintiff below alleges in his peti-

tion that certain frauds were practiced upon him; that the land was deeded to him by Garrett Heck in his lifetime; that he paid upon the purchase price \$4,000 in money; that he entered into an obligation by which he was bound to take up and extinguished certain mortgage debts secured by mortgage upon the property; that he paid upon that \$786.76, making in all a payment by him of \$4,786.76. He alleges that he made this purchase in 1873; that he took possession and continued in possession of the property until October of the following year; that he used it in the utmost good faith to test its capacity; that he then tendered a deed to his vendor, Garrett Keck, and demanded a repayment of his advance payments of \$4,000 and his subsequent payment of \$786.76; that Keck refused to rescind and repay, and in the month of November following, this tender being in October, he commenced his action in which he asks for a rescission. The petition ran along for a time without answer, and in May following a judgment was taken by default. Keck then came in and asked to have that judgment set aside, pending that motion Keck died. His will was proved and letters testamentary issued to his widow, Harriette Keck, and she qualified and went in and sought to make herself a party to the judgment. She was admitted, the record says for the purpose of hearing that motion. The motion was heard and overruled. I need not recite everything that was done in its order during the stage of the proceeding, suffice it to say he was not able to make herself a party. She then filed her petition in error, which was filed January, 1877. In that petition in error she claims that the court erred. First, though the petition shows the plaintiff tendered the defendant a deed reconveying the premises he did not tender possession before the suit was brought, and was not entitled to sue.

It is well known and well settled that this remedy, by rescission, is one of the extraordinary remedies of chancery, and before a party can claim to rescind he must divest himself of all benefits of the contract; he must restore to the party everything that he has himself received. We are told in answer to this that there is no real difference between seizing and possession. Whatever may be said on that subject in particular cases and circumstances, and in the pursuit of different remedies, we think there is a difference between seizin and possession. Where a party is seeking to restore by a reconveyance without possession of the property, and to leave the party to his remedy upon the deed to get by course of law possession of the property, is certainly not restoring that which the party received. He must not retain any benefit of his purchase if he seeks to avoid that purchase and have his contract rescinded. He must restore everything and put the party in the condition that he stood at the time of entering into the contract. Here he does not put him in possession, nor tender the possession. On the contrary, he prays in the petition that a receiver be appointed by the court to take charge of the property under the control and direction of

\*the court. He has had the property over a year in his possession. He does not offer to account, and it is a stone quarry 91 and a mill, a property that is wasted in the use, a property in which the substance of the estate is consumed in the use. He had been operating the mill and quarry for over a year before he tendered back his deed, and then did not tender the possession. He did not offer to account. He says he asks no interest for the money, and the use of the money is equivalent to the use of the estate. Well the estate was sold estimated between them at \$18,000. The money that had been advanced by him amounts to \$4,786.76, a very great inequality if we are to take the purchase price of the land as its true value, for he then had the use of the estate for over a year, and the other party had the use of only that sum—between \$4,000 and \$5,000 in money.

It cannot be possible that an estate would not be exhausted to some considerable extent in the use of a quarry in taking out stone and putting it into the market for a period of eleven months and upwards, for he took possession the 15th of September, and it was in the latter part of October before he tendered it back. There must have been considerable diminution. He offers nothing for this. He only gives a deed of the estate and asks a judgment for the amount of money he has paid, and that a receiver be appointed to take charge of the property and hold it under the direction of the court.

Now, to us that does not seem to be all that is required of an individual seeking a rescission of his contract. To have its obligations entirely lifted from him he must also have its obligations entirely lifted from the opposite party. They must stand as they did at the time the contract was entered into. In this respect, we think that the action for rescission was prematurely brought.

(Reading:) "The plaintiff below did not account to the defendant for the profits made out of or the injury or depreciation caused to the quarry by taking stone therefrom or for the value of said stone or the use of said premises." I need say nothing more on that subject.

"The case and the decree therein leave the defendant in error in possession of the premises and does not provide for the delivery thereof to the plaintiff in error." I have spoken sufficiently upon the subject.

"The decree was rendered *pro confesso* and without proof, on matters not competent to be disposed of in such a manner." As we read the entry of the judgment in this case, it is purely and strictly a judgment on default. It recites the fact that the defendant is in default, wherefore the judgment is rendered, and goes on and recites a different point of the order of the court.

It is very clear to my mind, and in that my brethren concur with me, that there are matters in this decree that cannot be rendered solely upon default. There are matters that require an inquiry by a master, referee or jury. This party alleges that he paid

on that contract \$1,000 at one time, and subsequently paid \$786.76. Now, does a default admit these various payments and the aggregate? We think not. We think there is an inquiry there that requires proof. It is really a statement of the damages which the party has sustained in consequence of that contract. He is out of pocket \$1,786.66, damages which he has sustained by actual expenditure of money. We think that this was a subject for which a jury should have been impanelled, or that should have been sent to a referee, or, if the party not in default was willing, it might have been inquired into by the court. Certainly a default does not carry such serious consequences as this, for, if it could carry this \$1,780, it might just as well carry \$47,000; there would be no end to the ruin that a default might bring upon a person.

Now, it is claimed that this plaintiff in error, the executrix, cannot pursue this remedy in error. We have given that subject a great deal of attention. It was a thing that occurred to us, that it was a necessary part of the remedial law that the person in privity as executor, testator, heir, that it was necessary that the representative brought into privity by law should pursue a remedy by error if there was error in the judgment. We have examined our own reports and the reports of other states, and find the subject satisfactorily adjudicated and settled that that remedy can be pursued by this executrix, and that she is fairly and properly in court seeking to reverse a judgment in which we find error. We, therefore, must reverse the judgment and remand it to the court of common pleas for further proceedings.

J. W. Heisley and J. J. Curran for plaintiff; Marvin, Hart & Squire for defendant.

### STREET ASSESSMENT.

[Cuyahoga District Court, March Term, 1878]

#### WALDEMER OTIS ET AL. V. CITY OF CLEVELAND.

When an assessment is to be levied upon property not abutting upon the improvement, such assessment may be levied in the manner prescribed in sections 548-589, inclusive, "upon lots and lands benefited thereby, including lots and lands that are contiguous and adjacent as well as those that abut" upon the street, according to the benefits thereto from the improvement.

LEMMON, J.

In the presentation of this case to the court, but one question was made, and we shall content ourselves with examining and passing upon that question.

It is maintained by the plaintiffs that when an assessment is to be levied upon nonabutting property—property not abutting upon the street improved, or upon the improvement—the city council, or

the board of improvements, must act in the first instance, and designate the nonabutting property to be charged, and also prescribe the rate, or proportion of the expense of the entire improvement, which the nonabutting property must sustain. It is claimed that this arises from the construction which necessarily must be placed upon sections 576 and 579 of the municipal code. Section 576 reads as follows: "For the payment of the cost of making the improvements and the cost of lighting the corporation, the council may, by ordinance, levy and assess a tax on all the lots or lands bounding or abutting on the proposed improvement, or on the streets lighted, such tax for lighting the corporation to be in proportion to the foot front of the lots or lands so abounding or abutting, and such tax for improvements to be assessed either in proportion to the foot front of the lots or lands so abounding or abutting, or according to the value of such lots or lands as assessed for taxation under the general law of the state, as may be equitable, and as the council may, in each case, determine."

Section 579, in immediate connection with this, and which brings in the nonabutting property, reads as follows: "If, in the opinion of the council or board of improvements, the same would be equitable, a proportion of the cost making the improvement may be assessed, as herein provided, upon such other lots or lands within the corporation, not bounding or abutting upon the improvement, as will, in the opinion of the council or board, be specially accommodated or benefited thereby; and said board or council shall fix the amount to be so assessed."

This latter clause would seem to indicate an expression of legislative intention to have the amount of the tax, which should be so apportioned upon the nonabutting property, to be ascertained by the council or board of improvements, and it would seem to necessarily imply that the persons appointed to make the assessment should not be trusted with the determination which the legislature seem to require shall be made by the city council or board of improvements, and we understand the supreme court, in the *Moss* case, to affirm this view of the case, and to recognize the legislative expression of intention here as one that is clear and explicit. Were this all there was in the matter, we should have no hesitation in determining the question and sustaining the view of the matter taken by counsel for plaintiff. The supreme court, however, in the *Messier* case, have taken a peculiar view of these statutes—to us, we must confess, a view that had not before entered our minds. It is held by the supreme court, in that case, that the legislative direction that the cost and expense of making improvements, either for the grading or paving of a street, or the widening, opening or extending of a street, should be apportioned upon the lots or lands abutting upon the improvement in proportion to the foot front or the valuation of the property, was not the only direction which, in the municipal act, the legislature had made in regard to this matter; but there was still a third method of making the appropria-

tions, to wit: that described in section 584. Previous to this decision, the members of this court had regarded section 584 as using general language, to be construed as having reference to and limited by the preceding sections, 576 and 579, which declared the manner in which the assessment should be made.

Now, section 584 reads as follows: "In all cases in which it is determined to assess the whole or any part of the cost of any improvement upon the lots or lands bounding or abutting upon the same, or upon other lots or lands benefited thereby, the council may require the board of improvements, or may appoint three disinterested freeholders of the corporation or vicinity, to report to the council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as can be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office," etc.

The supreme court, in construing this section in the *Messeur* case, hold that the general language here used is not limited by, nor has a reference to, the prescribed method of apportionment before declared by the legislature, to wit: apportioning the cost in proportion to the foot front, or the duplicate valuation; but they hold that those words, "in proportion to the benefits," or "according to the benefits," are used by the legislature here to designate a third method of apportionment independent of that before designated, and that this mode of apportionment is one in which the city council may adopt, notwithstanding, by their ordinance and their proceedings throughout the whole

92 course of declaring \*the necessity of the improvement and making it, they have declared that they would apportion the cost and expense according to the foot front of the property abutting upon the improvement; still, they say that the power of the city council is not completed until they have exercised the power which is conferred by section 584, and in addition to the apportioning upon such property the tax that may be found to be equitable, one lot as compared with the other, according to the foot front they may, as to such lots as they find not to be equitably affected by such apportionment, invoke the powers conferred by section 584, and distribute upon them the burden of the improvement according to the benefits.

Now, we understand that to be the direct declaration of the supreme court in this case, and, although we had not entertained that opinion before, we, of course, humbly bow to this decision, and look to it as the law governing this court.

There is no doubt that this opinion of the supreme court will, in many cases, avoid what has heretofore been regarded as a hardship—that of burdening lots that were of less depth than others; or peculiarly situated, with an expense equal to that of others that were so situated as to apparently acquire greater benefit from the improvement.



The supreme court, in the *Messeur* case, say: "Such being the force and scope of section 584, in respect to the improvement of streets under chapter 49 of the code, no reasonable doubt can exist that it has like force and operation in cases of assessments for the cost and expense of lands appropriated for streets, under sections 539 and 583, as amended in 1872; for, though the power described in the last clause of the proviso in section 539 is limited in terms to an assessment either in proportion to the frontage of lots or in accordance with their valuation, the provision of section 583 is that the cost and expense of lands appropriated for streets shall be assessed upon the property to be charged therewith, according to benefits, so that a resort ultimately to an apportionment according to benefits, is as clearly within the power of the council in the one as in the other case. In other words, the court is of the opinion that section 584 to 589, inclusive, have exactly the same operation and application in respect to assessments authorized by section 539, as amended, as they originally had to assessments made under sections 576 and 579."

They say, further: "In arriving at this conclusion, which we think is done by fair reasoning, we find the scheme developed in the code to be, in fact, what all systems of special assessments must be in theory, viz: an imposition of public burdens, arising from local improvements, upon the property specially benefited by the improvements, in proportion to the benefits resulting to the property. Whenever an inequality may exist in practice, under this system, we think the fault is to be found, not in the scheme itself, but in the manner in which it is applied in the particular case."

Now, they say, "When we had discovered the true intent of the legislature, there is no insuperable difficulty in harmonizing the views expressed with the language contained in the last clause of the proviso, which was amended in 1872, and which was admitted to be amended," etc.

The supreme court then arrive at the conclusion, after discussing the subject quite thoroughly, that section 584 was intended by the legislature to prescribe a third mode for the distribution of the cost of making an improvement, and that this third mode was subject to no limitation other than the opinion of the parties charged with the duty of distributing the assessment, in accordance with their best idea of what would distribute it according to the benefits which each lot to be charged had derived from the improvement. In this same connection, they dispose of the point which is raised in this case, and hold that where the burden of the improvement is to be distributed in accordance with section 584, a different rule prevails with regard to the persons who may, in the first instance, distribute this charge from what would arise in case it were distributed under sections 576 and 579, then the council or the board of improvements must, in the first instance, designate the nonabutting property to be charged; but if under section 584 they say, then, the freeholders appointed to make the assessment may, in the

first instance, designate the property upon which the improvement is to be charged, spread the cost over such property, and that this must be examined, and when examined by the city council and approved by them, it is a sufficient compliance with section 584.

Now, we think there can be no mistake, that that point was made, and intended to be made by the supreme court, and was by them passed upon and settled. They say: "It is made the duty of the assessors, acting under this section, to report an estimated assessment of the cost of the improvement upon the lots and lands to be charged therewith, and it is true that, previous to the amendment of section 539 in 1872, the lots or lands subject to be charged by assessments were designated under section 576 as bounding or abutting on the properties improved, or, under section 579, were to be ascertained by special selection by the city council or board of improvements; but when the power to assess the cost of lots or lands appropriated for streets was first given under section 539 as amended in 1872, the property to be charged was described as 'lots and lands benefited thereby,' and therefore, without designating who should ascertain the specific property, the statute proceeds to declare: 'This power shall be executed as provided by section 583,' namely, under sections 584 and 589."

The Court: And those are the sections under which this tax can have been assessed. They say: "Inasmuch as sections 576 and 579 are not referred to, it is fair to infer of that class of assessments that the intention of the legislature was to authorize the assessors to act upon the general descriptions of property to be charged. This construction, however, does not place this selection of the specific property under arbitrary control of the assessors, as their report is to have no effect until adopted by the council. So that the statute secures the judgment of the assessor, and also of the council, in ascertaining the specific property including under the general description of lots and lands benefited."

We have carefully read the decision of the supreme court, and have endeavored to arrive at the determination which it had made on this subject, and apply it to the cases that are here pending. We think that the supreme court has left no opportunity for misjudging its opinion; that it has intended to make it distinct and that it has passed upon the direct question which is here raised, and we, therefore, finding what it has decided, apply it to this case, and must dismiss the petition and dissolve the injunction.

S. O. Griswold and Wm. Seafert, Jr., for plaintiff; Heisley and Weh for defendants.

**ARBITRATION—LIEN—DEMURRER.**

[Cuyahoga District Court, March Term, 1878.]

**ELLEN HART V. JOHN CORLETT, EXECUTOR OF THE ESTATE OF  
JAMES SPEAR, ET AL.**

1. The submission of a claim by an executor against the decedent's real estate is unauthorized, and the award constitutes no cause of action.
2. A judgment against the seller of liquors is not a lien on the lessor's premises until so declared by judgment, and if the lessor dies, the liability abates and no lien can be taken against his heirs or devisees.
3. Error in sustaining a demurrer to a cause of action in a petition is not ground of reversal, if on the trial the cause of action was gone into and a verdict rendered against it.

**WATSON, J.**

In this case there is a petition in error, filed by the plaintiff, in which she seeks to reverse a judgment of the court of common pleas of this county, for various reasons, which she assigns. The judgments which she seeks to reverse was rendered upon a petition filed by her against John Corlett, executor, and the other defendants, in the court of common pleas. In that petition she alleges that on or about the 4th day of January, 1875, she recovered a judgment against one Edmond Wood, in the superior court of Cleveland, in said county of Cuyahoga, for the sum of eight hundred dollars, damages, and twenty-eight dollars and seventy cents, costs of suit; alleges the issuing of execution and the return of no goods and chattels, etc., and increased costs to the amount of one dollar and ninety-five cents; alleges that that judgment remains in full force and virtue in law, and wholly unpaid, that it has been a lien on certain premises, which she describes from the 4th day of January, 1875; that said James Spear, on or about the 1st of July, 1870, rented and leased to said Wood, and permitted him to occupy and use in part and in whole, the following described premises—she then goes on and describes the premises, being a lot, with a building—improvements—on it, in the city of Cleveland, that it was leased to him for two years and one month from and after the 1st of July, 1870, and that it was leased for the sale, contrary to law, of intoxicating liquors; that Wood, on and after the 1st of July, 1870, and down to the 23d of July, 1872, did so use and occupy by virtue of said renting and leasing and permission in part and in whole, said premises, and therein and thereat, on each and every day between the two dates last set forth sold, contrary to law, intoxicating liquors to the plaintiff's husband; that the judgment recovered was against Wood for sales, contrary to law, made by the said Wood and his agents duly thereunto appointed, to the plaintiff's husband of intoxicating liquors, on and between the 1st of July, 1870, and the 23d of July 1872, in and upon said premises

above described, during all of which period of time James Spear knowingly suffered and permitted said Wood to sell contrary to law, intoxicating liquors to be drank where sold, to this plaintiff's husband, that on the 23d day of November, 1874, said James Spear departed this life, and said John Corlett was, on or about the 4th of December, 1874, duly appointed executor of the said James Spear's estate; that this plaintiff's claim was duly authenticated on or about the 16th of April, 1875, and duly presented to said John Corlett for allowance, and was then and there by him rejected and disallowed. The plaintiff prays that her said judgment and costs may  
93 be declared a lien on said premises that she may have execution \*against the same, and that said premises be sold to satisfy her said judgment and costs and for such other and further relief as justice and equity may require.

To this petition the defendant, the executor of Spear, demurred. This demurrer was sustained and leave was taken to amend. After some delay the amendment was made, and it recited that at the death of Spear he left a widow, Melissa, and left four children, his heirs; that all of them save one were minors, Mary Elizabeth, the oldest of the four, being of age. It is alleged that by his will he made Mary Elizabeth the guardian of the minor children. It appears that Melissa, the widow, is in the lunatic asylum. That appears subsequently in the case, but not in the petition. To this amended petition there was a demurrer, and that demurrer was sustained and leave to amend was taken. The amendment alleges that on the 14th day of February, 1876, since the commencement of this action, the plaintiff and the defendants agreed to submit to the award of Robert Mitchell and Joseph Turney certain matters in difference then pending between them. Said differences are more fully set forth in the original petition in this case filed. In pursuance of that submission, the said Robert Mitchell and the said Joseph Turney, on the 14th February, 1876, awarded that the defendants should then pay to this plaintiff the sum of three hundred and twenty-five dollars, of which the defendants then and there had due notice; and the petition alleges there is due to the plaintiff, upon and by virtue of said award, the said sum of three hundred and twenty-five dollars, with interest from said 14th day of February, 1876, no part of which has been paid, and for which she asks judgment.

Now, she alleges the subject matter of difference between them had been submitted to arbitration and an award rendered. A motion was made to strike this petition from the files, which was overruled; the defendants answer, and a hearing was had, and all the evidence on that hearing was set out. The submission and award are set out as exhibits, and part of the bill of exceptions. The following is the submission: "I, the undersigned, do agree to the decision made by Mr. Mitchell and Mr. Turney in the case of Ellen Hart against James Spear, defendant. Cleveland, February 14, 1876. (Signed) James Corlett, executor." We may remark

here that no such case was in being as Ellen Hart against James Spear. The case pending was Ellen Hart against Corlett, executor, and Wood, and heirs of James Spear. That is the submission on his part. The following is the submission on the part of the plaintiff: "For a valuable consideration received to my full satisfaction of John Corlett, administrator of the estate of James Spear, I do hereby release and acquit the estate of the said Spear from all claims demands, actions or causes of action which I have, or may suppose I have, against the said estate by reason of the sale, or alleged illegal sale, of intoxicating liquors to my husband with the knowledge or permission of the said Spear, in full to date," which was January sometime, 1876.

Now, here is the award. I may remark in passing, although it is, perhaps, an unnecessary remark, that it is elementary in the law of submissions to awards that the arbitrators or the umpires, which ever it may be, derive their power from the submission. That is the commission under which they act, and that clothes them with authority to judge between the parties. It would be difficult to see what is submitted here: "Cleveland, February 14, 1876. We, the undersigned, arbitrators between John Corlett, administrator of James Spear, and Ellen Hart, plaintiff, do find for Ellen Hart damages against the defendants, \$325. (Signed) Robert Mitchell, Joseph Turney." Another exhibit set out is the claim which the plaintiff had verified and presented to the executor for allowance, is the judgment and costs upon it which she had recovered against Wood.

On the hearing of this case these arbitrators were called as witnesses, Corlett, the executor was called as a witness, Mrs. Hart was called as a witness, and each of them told his story without being sworn. Nobody requested them to be sworn. Nobody required it. They told their stories. The arbitrators went out and made this award and came in before they had left the premises and published it, and thereupon Corlett refused to be bound by it. The original award was lost, and the one I have read is said to be substantially a true copy of the award. When it came on to be tried it was insisted on the part of the plaintiff that they could not depart from that award—the supplemental petition in the case. It is claimed the case must be confined to that. The judge presiding ruled that the whole case was open; that the three papers, the original and the supplemental petition, with the answers constituted the issues to be tried. No evidence was taken except under the second supplemental petition, the submission and the award, and no other witnesses were called than the arbitrators and the parties. The court found for the defendant, there being no evidence on anything except as I said, under the second supplemental petition. What the reasoning of the judge was we do not know, but we are to infer that it was because there was nothing submitted. There was no recital of the matters in difference between the parties. Neither party submitted anything. The plaintiff gave a receipt against the

estate, conferring no powers upon the arbitrators, and the defendants approved the award as made by the arbitrators. That was all there was of it. The heirs were not present. Mary Elizabeth, the guardian of the minor heirs, says she never heard of the submission until the award was made. Nobody was present that was in any way authorized to represent them. The executor had been doing the general business of the estate. The guardian said he had been collecting rents for her—matters pertaining to the guardianship; that was the way in which it went to the arbitrators. We are to infer that the judge held there was nothing submitted; that there was no authority in the arbitrators to act; that the whole thing was void, as it occurs to us, he must necessarily have found.

It is complained that the court sustained the demurrers to the original and first supplemental petitions. The original petition set out the case against Spear, the judgment against Wood, and the case against Spear—the consent to the sale of the liquor, and, in fact, the renting for that purpose, to which the demurrer was properly sustained for the want of parties. Then the heirs and widow having been brought in it is claimed that the petition was good and that the demurrer should not have been sustained. Be that as it may, that demurrer was substantially set aside at the hearing, the court ruling that they could go into the whole case on the original and all the amended petitions together. They declined to give any evidence on anything save the second supplemental petition which was the arbitration, and the arbitration falling the result of the trial must fall with it.

We think this is a sufficient answer to the claim that there was error in sustaining a demurrer to that petition. To my own mind there is a different rule and upon which we have not sufficiently talked among ourselves for me to say that our brethren fully agree with me, and that is this: We cannot lose sight of the fact that this act of 1854, as amended, known as the Adair law, is very far from being a carefully drawn statute, and it is somewhat difficult for a court to feel entire confidence in giving a construction to it.

It declares in the 10th section that a judgment recovered and fine assessed shall be a lien upon the land, but they are not a lien absolutely upon the lands occupied unless the lessee consents to the selling of the liquor, either impliedly or expressly. He must either rent for that purpose, or, having rented for another purpose, he must know it is used for that purpose, and permit it to go on; and under these conditions, the judgment for damages and fine and costs, can be enforced as a lien upon the property.

The statute provides that a proceeding may be instituted for establishing the lien. It cannot be possible that as soon as the judgment is rendered it becomes a lien upon the land at once, and absolutely. It cannot be possible that anterior to the rendition to the judgment, during the time the statute is being violated, that a lien is at all resting upon the land. My own notion about it is it does not become a lien until it is adjudged a lien against the owner

upon a proceeding for that purpose. Whatever it may be before that time it is an inchoate thing that would certainly not follow the land into the hands of a purchaser, and I am clear in my own mind that it would not follow in the case of descent to heirs.

It appears that Spear died in November, and on the 5th of January following, a judgment was rendered against Wood. There never has been a judgment declaring it a lien as against Spear or the heirs of Spear. I should myself, judging the case, therefore hold there was nothing that could be enforced on the judgment as a lien until it had been adjudged to be such in a regular proceeding, fixing upon the owner of the land a knowledge of the violation of the statute and consent thereto, either expressed or implied.

With these views I think the demurrers to the original and first amended petition were properly sustained.

In taking into consideration what I have expressed as my own opinion, it may be said that this is not one of the questions fairly raised upon the record. Be that as it may, we regard minor heirs the wards of the court, and we regard it the duty of the court to see that nothing shall be taken from them that the law does not fairly take from them. With these views nothing remains but to affirm the judgment of the court below.

W. C. Rogers and L. J. Rider for plaintiff; W. S. Kerruish for defendants.

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### \*CONTRACT OF SALE.

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[Cuyahoga District Court, March Term, 1878.]

ROBERT R. RHODES ET AL. V. POWERS COAL COMPANY.

Under a contract to ship coal, to be delivered at various times, each party to have the right to terminate the contract, in which the buyer may rescind if the coal contains too much slack, but if he continues to receive such coal without protesting or rescinding the contract, his right to claim damages for the excessive slack is waived.

ERROR to the court of common pleas.

TIBBALS, J.

This case was tried below and resulted in a verdict in favor of the plaintiffs below. A motion for a new trial was made and overruled and exceptions taken.

The errors relied upon are two. (1) That the verdict is contrary to and not supported by the weight of evidence. (2) Error in the charge of the court. The action was originally brought upon two causes of action growing out of the execution of the same contract. It was ascertained that the first cause of action was prematurely brought and was therefore withdrawn, and the case submitted to the jury upon two causes of action, and the answer and counterclaim of the defendant. It seems that in 1873 the Powers Coal company of

Youngstown, entered into a contract with Rhodes & Co., of this city, by which they were to furnish them some 5,000 tons of coal at the price of \$3.04 per ton, and to be shipped in quantities from eight to twelve car loads a day until the entire amount was supplied. The parties were to execute their notes each month for the amount. The second cause of action is founded upon this state of facts: That after shipping two-thirds of the coal the defendants terminated the contract and refused to receive the remainder of the coal; the plaintiffs sought to have them accept it and they refused to receive it. They aver that the coal declined in price from \$3.04 to \$2.75 per ton, and that the damages would be determined by the difference in the price in the depreciation of the coal.

The defendants answered admitting the making of the contract, the receipt of the quantity of coal stated, but they set up that it was a part of the contract that it was to be good screened, merchantable coal; that as such, it would contain slack only to the extent of about two hundred and fifty pounds to the car load, but that in fact it did contain about two thousand pounds of slack, being an excess of about seventeen hundred and fifty pounds to the car load; that they were unable to determine this fact until they unloaded it, and they, therefore, ask by way of counterclaim to recover for that amount of coal, averring that the same was in the neighborhood of 3,900 tons. That issue was submitted to the jury. A large amount of testimony was taken upon both sides. The plaintiff, to maintain its case, brought evidence tending to show that at Youngstown this coal was delivered in good condition; that it was in accordance with the contract; that it did not contain this amount of slack. On the other hand evidence of a very positive character was taken in this city showing that they had very carefully tested the coal by measurement and weight and had ascertained this state of facts—showing further that the slack could not have been created in the transit from Youngstown to this city. The jury found in favor of the plaintiff, thus ignoring the claim of the defendants.

In connection with this it is argued that the court misled the jury in its instructions with reference to the effect to be given to the testimony of the Cleveland witnesses, but which was not sufficiently excepted to make it available as error. The court say: "Evidence was introduced by the plaintiff to show the character of the coal at the time that it was put upon the cars. Evidence was also introduced by these defendants to show the character of this coal at the time it was received by them in the city of Cleveland. Now, a contract that provides for the delivery of an article at a certain place or point requires the character of the article to keep to the standard fixed by the contract at the place of delivery. The defendants have offered evidence here to show the character of this coal at the place of the consignment, that is to say, at Cleveland. You must consider the testimony to this extent as to circumstances showing or tending to show the quality of the coal when delivered at Youngstown. If you are satisfied from the circumstances of the



character and condition of this coal at the place of consignment that it could not have been merchantable lump coal at the place of delivery, then that circumstance will weigh in favor of these defendants to whatever extent you, guided by the light of this testimony, may deem proper."

Now, it is said that is a sort of limitation upon that evidence. It is an intimation to the jury that there is a distinction to be drawn between that and the evidence at Youngstown. But if we go back, in this same matter, the court say, speaking of this evidence, "In estimating this it is your duty to consider all the testimony that has been submitted to your consideration with a view to arriving at the fact as nearly as may be as to the quantity of slack if any, but if after an examination of the testimony you shall be satisfied that the claim of the plaintiff is not sustained by a fair preponderance of the evidence you may disregard it."

Now, as the court after all submitted to the jury the question of the real condition of that coal and that condition to be determined at the point or place of delivery, which of course was the correct place, we think fairly considered, the jury would not be misled by that; that they were at liberty to give this testimony all the weight they thought it was entitled to under the circumstances.

\*Viewing it in that light, it leaves to us the determination of the question as to whether the evidence sustains the verdict. For myself, I have no hesitation in saying if I had tried that case below, I would not have permitted that verdict to stand. I feel that the evidence was so clear, at least as to the condition of the coal in Cleveland, that the jury must have disregarded that largely. But it cannot be denied that there was a large amount of evidence upon the other side. It was of a positive character testified to by those parties in Youngstown as to the condition of the coal when it was delivered upon those cars and that was fairly submitted to the jury; and it was wholly within their province to determine the question. The court, after hearing all of this evidence concluded that if the case was not properly decided by the jury it was not so clearly wrong as to justify disturbing it.

Now, the supreme court has said that motions for new trials, upon the ground that the verdict is against the weight of evidence, are addressed to the discretion of the court, and if granted, the judgment will not be disturbed on error unless the case is so strong as to show an abuse of discretion. That was applicable to the court below. "And if the motion be overruled, a reviewing court should not reverse unless the verdict is so clearly unsupported by the weight of evidence as to indicate some misapprehension or mistake, or bias on the part of the jury, or a willful disregard of duty." Now, we have reached a conclusion guided by that rule. We cannot see that this jury misapprehended, or that they made such a mistake that it will be within the province of this court to set aside that finding of the jury.

Another question submitted is upon the charge of the court. The defendant also, by way of set-off, set up in its answer that at about the same time these parties entered into a contract to deliver a quantity of nut coal at the price of \$1.45 per ton, to be, as the answer expresses it, without limit as to the quantity of coal or time. They were to receive as long as they chose, any quantity and any time it was to be delivered. They aver that after the delivery of a certain quantity of coal they came to the conclusion that they were sending more slack than was permitted under the rule. That 500 pounds to the car load is the limit, and that it largely exceeded that; that they were unable to determine that fact until it was unloaded; that they notified them of it; that they continued to ship and they to receive, until finally they terminated it and said to them they would take no more, and that they charged up what they regarded the excess of the slack, and undertook to recover that in this action as a set-off to this claim of the plaintiff.

It is claimed that the court erred in its charge to the jury upon this subject. "It is claimed by these plaintiffs that they were to deliver at Youngstown at the point named, and the defendants were to receive at their office" (speaking of the nut coal). "Now, if the first car load or first ten car loads did not contain merchantable nut coal, the defendants had it in their power to put an end to the contract. If they received the coal without protest and without notification that ten car loads of unmerchantable coal had been received, you may infer that the contract had been complied with with regard to the ten car loads then delivered."

In other words, the court said to the jury, it being optional with the defendants to receive coal in just such quantities and during just such time as they chose, having the right to terminate the contract when they chose, having the right to refuse to receive any more coal, because it is not of the quality contracted for, if they receive that coal they waive their right to complain. We are unable to perceive that there is any error in that matter of law. As the court said, these defendants, when they received the first load, if they discovered that it had an excessive quantity of slack in it they had a right to terminate the contract for that reason, and refuse to receive any more; but if they accept that, as the court says, without protest, and receive more coal, continuing to receive coal without protest, we do not think they would have a right to interpose a claim for damages for this excessive slack which they voluntarily received. We conclude that the court did not err in that proposition of law.

H. C. Ranney, E. J. Estep for plaintiffs; Hutchins & Campbell for defendant.

**POLICE COURT—CITY ORDINANCES.**

[Cuyahoga District Court, March Term, 1878.]

**JOHN P. O'BRIEN v. CITY OF CLEVELAND.**

1. Under section 1692, Revised Statutes, it is within the power of a city to prohibit by ordinance the publication of obscene matter.
2. The prosecuting attorney of the police court need not swear to an information filed by him for the violation of a city ordinance.
3. In a prosecution under a city ordinance, the certificate of the clerk of the due publication of the ordinance is sufficient proof thereof.
4. A warrant from a police court may be signed by the clerk of the police judge; this is an issuing of it by the judge through his clerk.
5. Where a city ordinance imposes a greater penalty than it has power to impose, a sentence thereunder which is within the amount of punishment allowed by the state law is, under section 106 of the code, valid.

TIBBALS, J.

It is claimed in this case that the court of common pleas erred in affirming the judgment of the police court in this city. The errors assigned are very numerous. Among those relied upon are the errors of the police court in the arrest, trial and conviction of the plaintiff in error. The plaintiff in error was arrested under an ordinance of the city for printing and publishing obscene matter. It is claimed that the information was not sworn to; that the warrant was not signed by the proper officer.

We find on examining the record that an affidavit was made against this party by a man by the name of Smith, charging him with being the publisher of certain matter which is set out in the information. A warrant was issued signed by the clerk of the police judge, and it is said that that was irregular and in fact no warrant. We have no trouble over that question. There can be no doubt but that the judge can issue his warrant through and by means of his clerk. He is the proper officer to issue it. When he was brought into court the prosecuting attorney of that court filed this information; and it is said that he didn't swear to it. It is said, further, that it is a prosecution in the name of the state for a violation of a state law, and not a violation of an ordinance. We nowhere find any authority requiring this attorney to swear to his information. He signs it officially. It is his official act in the nature of an indictment in which he sets up the charge against this party for the purpose of giving him to understand the nature of the charge against him. It is not a prosecution under any state law. All that has been said on the subject of its being in violation of the criminal code in not furnishing him with a copy of the information, or other copies of that he was entitled to or which it is claimed he was entitled to, has no application to proceedings in this court. It is claimed that, because in the heading of this information, it is said "in the name and by the authority, and on behalf of

the state of Ohio"—that that is conclusive that the prosecution was not under the ordinance; but if we turn to the closing part of this, we find, after setting out the charge: "Contrary to an ordinance of said city in such case made and provided, whereupon, said prosecuting attorney of said court, who prosecutes for said city, prays for the consideration of the court here in the premises."

The entire proceedings, all the way through, clearly indicate that it was a prosecution in that court for a violation of this ordinance, and in the name and interests of the city, notwithstanding the mere expression in the heading part of the information.

It is objected further that he was not permitted to have a jury of his choice. He says he demanded a jury; but the trouble with him is that the record shows that he got a jury; he had more of a jury than he wanted instead of not enough of it. But his claim was that he ought to have come into some other court to have a jury there; but he had a jury in that court, a jury impanelled in accordance with the law and ordinance of the city, and that jury found that he was guilty of a violation of the ordinance. We do not think he ought to complain of not, at least, having enough of a jury.

I have already said that it is not a prosecution under the statute of the state. But it is said further that the code confers no power to regulate this offense. Now the legislature has authorized cities to pass ordinances to this effect: "To prevent riots, gambling, noise and disturbance, indecent or disorderly conduct or assemblages, to preserve the peace and good order, to protect the property of the municipal corporation and its inhabitants."

This brings us to a very brief discussion of the character of this charge. It is enough to say that it contains a charge that this man did frequently publish, expose, circulate, offer for sale, and distribute within the limits of the city, a certain obscene and scandalous print, a newspaper known as the Sunday Times, containing the following obscene, immoral or scandalous words, to wit:

Now, in response to this authority by the legislature; the council undertook to regulate these various subject matters. It has passed an ordinance embracing a large number of sections, and including a large class of prosecutions for things which tend to the corruption of the morals of the place; things which are indecent, things which are disorderly, which tend to disturb peace and good order, and among them they have provided that it shall be unlawful for any person to publish, or print and circulate within the limits of the city a thing of this character

To determine whether it is a thing of this character or not it is enough to say that it embraces language and sentiment so gross and so immoral and so indecent as to render it improper that it be read from this bench in the presence of gentlemen. What would be said if this publication circulated throughout and into all of the families of this city?

Now, can it be said, if this man went upon the street to recite this to an assemblage, that it would not be indecent and disorderly in him to do so. Certainly, no one could claim that. If it be indecent for him \*to recite it, is it any the less so for him to put it in the form of a paper and send it through the medium of such papers through the entire length and breadth of the city? Is that any the less immoral? Any the less indecent? Any the less disorderly? Does that any the less tend to the disturbance of the peace and good order? It seems to us not. It seems to us the legislature intended to grant to corporations the power to protect the public against just such utterances as these upon the streets, or in the houses, or in the offices, or anywhere; that it was designed to promote the good morals of the city, and any one who violates that violates that law. 101

More than a quarter of a century ago the supreme court of this state used this language as to the powers of corporations:

"In determining the powers of municipal corporations it is right and proper to allow them the exercise of all powers expressly granted, and such others as may be necessary to carry the power expressly granted into execution."

What more appropriate language than that to apply to this case? If they have a right to suppress the immoralities that this publication leads to, if they have a right to prevent the lewdness that this incites in the community, if they have a right to prevent disorder and disturbance of the people in this community in itself, have they not a right to suppress that which necessarily leads to it — which creates, promotes and encourages it?

We are inclined to permit a court higher than this to determine that that legislation is not within the fair and legitimate scope of the powers of this corporation. The people need protection against just such publications. The authors of just such publications need conviction and punishment. We think that point is certainly not well taken.

He says that this ordinance was never published within the time prescribed by law. It contained the certificate of the clerk to its publication. We hold that that makes a *prima facie* case. The code expressly provides that if it be made to appear it was not published a sufficient length of time it would be a defense to the ordinance. We hold that it is incumbent upon him after a *prima facie* case is made to establish that. Nothing of the kind was undertaken.

He says the ordinance oversteps the right of the city to punish. The ordinance provides a penalty of so much for the first offense, and so much for the second and third, and where the repetitions were numerous it would probably exceed the limit fixed by the city. But we think the legislature intended to provide for that, for in section 106 of the code it is provided: "But where in any by-law or ordinance a greater fine, penalty or forfeiture is imposed than as above specified, it shall be lawful for the court or magistrate in any suit or prosecution for the recovery thereof, to reduce

the same to such amount as shall be deemed reasonable and proper, and to permit a recovery or render judgment accordingly."

Now, he was not punished in excess of this provision for the first offense. His fine and imprisonment was less.

We are clearly satisfied that although there may be some provision in that ordinance which are outside of the authority of a council to provide, yet in such case it may be error if it is determined, but that is not involved in this case because he was not punished beyond the amount prescribed by the statute.

It is finally argued, and with a great degree of eloquence, that if the courts do not come to the rescue of this class of people, whose rights are thus trampled upon in the courts, that it will result in revolution; that the people will take it into their own hands, and courts of law and all will be driven to the wall.

It requires, to say the least, a good degree of assurance to intimate to a court hearing a case that that court must protect the rights of these men, and that they must do more than protect their rights, they must release them, when in the judgment of the court they ought not to be released. I am inclined to think that that is a worse misappropriation than wasting sweetness upon the desert air. This man has been convicted of one of the most infamous offenses that can be committed within the limits of this city. He has undertaken the publication of a paper which is not only a disgrace to him, but it is a disgrace to the city to permit it; and the city in its strength undertook to prohibit it, and it succeeded to the extent of his conviction and his imprisonment, and, as we think, in a lawful and proper way.

The law possesses the power to maintain its own dignity, and to protect the public in its purity, we think, as against those who seek to resist and destroy both. The courts ought to be prompt to vigilance in the prosecution of these men who undertake to interpose this communistic doctrine of resistance to the authority of the law and power of the court.

This judgment will be affirmed with costs.

S. O. Griswold and J. W. Street for plaintiff; Heisley and Weh for city.

### BUILDING ASSOCIATIONS.

[Cuyahoga District Court, March Term, 1878.]

Watson, Hale and Tibbals, JJ.

C. B. LOCKWOOD, TRUSTEE, v. A. S. ROBBINS ET AL.

1. A building and loan association which is forbidden by its charter to loan to any but members or depositors, made a loan to one who deposited \$25 before delivery of his mortgage, and drew it out the day after, is not unauthorized, and such mortgage is valid.
2. Where a mortgagee, holding several notes secured by the mortgage, assigns the first one to one person, and afterwards the others to other persons, the person who obtains the first note is entitled to priority on distribution.

WATSON, J.

We have examined this case and have come to a conclusion satisfactory to our own minds.

In January, 1869, Mark Burt owned a lot or piece of ground with its improvements on Bank street, in this city. He desired a loan of \$4,000. He applied to the Citizens Savings and Loan association for the money. His application was made in the usual form, in writing, in which he proposed to take a loan and secure it on that tract of land. For that loan he bid six per cent. interest and six per cent. premium payable annually. Some stress is laid upon the fact that that application is in the writing of the secretary of the association. We do not attach much importance to that. It was the act of Burt. It made no difference who wrote the application for him as his agent. The application was accepted. On the 12th of January the mortgage was executed, except its acknowledgment which was done upon the 13th, and on that day it was delivered and with it a note for four thousand dollars—completing what had to be done by Burt in making his application and fixing up his security.

It is claimed that this association could not lend money to Burt; that he was not a member of the association or a depositor. That seems to be an admitted fact. But on the 13th of January, before completing the transaction, he did make a deposit in that institution of \$25.00 and that deposit was checked out on the 14th of January. It is claimed he is not within the letter of the statute, not a member of the association; that he must be an actual member of the association or an actual depositor; that he must be contributing to the association, its influence and capacity, before he can receive a loan at the hands of the association, and, therefore, that the loan made to him by the association was made without authority. We cannot look at it in that light. We cannot see that it is beyond the power of the association. In its organization it had its mode of acquiring capital, getting means to loan in its business, mainly, of loaning money. It was then within the general scope of its authority to loan money. It had the money on hand. It was able to loan it and did loan it. We cannot look upon it in any other light than that it was within the scope of the authority of this institution to make that loan. We think that the utmost that can be said in regard to it is that it was an irregularity in the mode of transacting business.

It is claimed that the institution might recover of Burt for money had and received; that the securities given were void, and that the association had no lien upon this lot. We do not look upon it in that light. We regard the mortgage as creating a lien upon that property. The property was subsequently sold by Burt to Robbins, who say he had no actual notice, yet the mortgage was on record and he had constructive notice, such notice as everybody has of a recorded mortgage. He says he relied upon certain statements that were made by Burt in regard to the property being free

from any incumbrance. However much that might affect Robbins we do not think it affects the validity of this security in any form.

The plaintiff, Lockwood, as trustee of Hiram college, holds the first of those notes that were given on the sale of that property by Burt to Robbins, Burt taking notes, for a part of the purchase money, of a thousand dollars each, payable at intervals of a year. Hiram college became the owner of the first note, which is in the hands of Lockwood as trustee, and he says that it is the first of the series, and he is entitled to priority, a fact which appears in the case.

We think, then, that the loan association holds the first lien for the amount due upon that mortgage, and, however hard it may be in the way of dealing, that the terms of that contract are binding, and that until the premium was reduced he was liable for his bid of six per cent. interest and six per cent. premium. The premium during the time was reduced to four per cent. We think that in the decree the loan association should have priority to the amount due upon that note; that they should have a decree subjecting the land to sale for the payment of it. The remainder of the notes are in the hands of Shephard, and the question as to the distribution of the proceeds after that, is between Shephard and Hiram college. As between them we regard Hiram college as having priority and the decree in the case may be drawn accordingly.

Marvin, Hart & Squire for Burt; E. J. Estep for Savings & Loan Association.

[Cuyahoga Probate Court, March Term, 1875.]

CITY OF CLEVELAND v. MARY SLADE.

If a city build a school house partially on its own lot, part of the building being on the property of a private person, such person would be entitled to the accumulation if he did not clearly assent to such building, and in condemnation proceedings the additional value must be assessed to him.

TILDEN, J.

Gentlemen of the Jury: The city in this action seeks to appropriate the land of Mary Slade, situate and being 80 feet front on Arlington street, and about 120 feet deep.

In some respects this case is a peculiar one, and presents some novel and interesting questions. It may, in fact, be said that of all the numerous appropriation cases that have been brought before me, this contains questions and features that have never arisen before, and I may be safe in saying have never arisen in any case before any court in this state.

First, In order that you may arrive at a correct conclusion in this case, it will be well for you to suppose in the first place, that



the city has built its school house upon its own land. The question that you would then determine would be how that building has affected her land. Has it depreciated it, or increased its value? If her land should be depreciated in value by reason of such a building, built upon the land belonging to the board, that depreciation and loss she would have to sustain. If on the other hand, her land was increased in value by reason of such improvement (although not on her land) she would be entitled to that increase in value at your hands.

Second, Now it seems and it is not denied that a portion of this high school building is built on Mary Slade's land. That the board of education took possession of her land about in May, 1877, and from that time on have occupied it, and built this portion or vestibule of the high school upon her land. The portion so built upon her land being about 14x20 feet, and about 62 feet in height.

Now the claimant, by her attorneys, claims that that being so, then the owner, Mary Slade, is entitled to the accumulation. That the building having been erected upon her land without her consent that that part of the building becomes a part of the soil, and belongs to the owner.

This, I say to you is good law.

The board of education, under our constitution and laws, has the right to take private property for public uses, and the board of education has the \*right to take this property, but this right to take it is subject to the *condition* of *first* making compensation. Private property cannot be taken by this board first and compensation be made afterward. So that, it is true, that if this property was taken and built upon before being appropriated, the owner of the land is entitled to the accumulation—subject to one exception, and that is where the owner *assents* to the taking of his property. That is to say, if you should find that Mary Slade assented to the taking of her property by the board, then the above rule, as to accumulation, will not apply. But this assent must be clearly established. This assent must be in effect as though she had said, "I authorized you to go on and built on my land and pay me for it afterward."

But now, if you find that she did not assent, then the above rule, as I have said, will apply to this case, and she will be entitled to the improvements built and now on her property, put there by the board.

Third, The third and last question, and the most difficult, will be then, *how* shall she be benefited? The answer is that it will be a question of value. What value has this improvement given to her property?—that is, how much more in the market is her property worth with this building upon it. That is a question for you to determine.

I will say further to you, that the witnesses that have been called upon both sides of this case are all intelligent and well known citizens, and yet there is no class of human testimony so varied as upon questions pertaining to the value of real estate.

The witnesses in this case vary from \$25 to \$65 per foot.

All I can say to you in regard to this testimony is, that that witness is the best who gives the best reason for his opinion as to the value of this land.

You will now take this case and give to this claimant all her property is worth, applying the above principles to the testimony as developed in the course of this trial.

Stone and Hessenmueller, attorneys for Mary Slade.

Geo. S. Kain, attorney for Morgan, Root & Co.

City Solicitor, per F. T. Wallace, for the city.

The verdict was \$4,760—as follows:

For the land .....	\$4,000
For the building.....	760
	<hr/>
	\$4,760

### WAREHOUSEMEN.

[Cuyahoga District Court, 1878.]

#### COMMERCIAL NATIONAL BANK v. H. C. BURT.

Where a warehouseman issues a warehouse receipt to one who had left certain articles on storage, and the bailor transfers such receipts as collateral to a loan, but before transferring the receipt the bailor gets back his property from the warehouse unbeknown to the warehouseman, and afterwards assigns the receipt, the assignee cannot hold the warehouseman liable.

TIBBALS, J.

The case was tried before a court and jury below upon the pleadings as they then stood, and a verdict rendered in favor of the plaintiff below. A motion was made for a new trial, which was overruled and exceptions taken. To the proceedings had before the court, several exceptions were taken. The action was brought by the bank against Henry C. Burt upon substantially this state of facts as averred in the petition: That between the first days of August, 1873, and the 15th day of June, 1874, the plaintiff loaned, in its usual way, sundry sums of money to one Samuel F. Lester, amounting in the aggregate to some \$5,100.00; that it received, as evidence of the loan, certain notes; that, to secure the payment of the notes and of the loan, Lester transferred and delivered to the bank a number of warehouse receipts held by Lester for a certain number of barrels of flour left in the warehouse of Burt. The petition avers that those several sums of money were not paid; that there remained due some \$3,100; that Lester died insolvent; that demand was made on Burt for this flour; that he declined to surrender it, and avers he had converted it to his own use. The bank seeks to recover a judgment against Burt for the value of the flour to the extent of its claim against Lester. To that petition an answer was filed by the defendant, Burt, setting up five grounds of

defense. To that answer the plaintiff filed a motion to strike out as redundant and irrelevant certain matters contained in the first defense. This motion was granted, the defendant excepted. The plaintiff also filed a demurrer to the third, fourth and fifth defenses. This demurrer was sustained as to the third and fourth defenses, to which the defendant excepted. The defendant then filed an amendment to the answer in which he set up certain amendments to that portion of the original answer that was left on file. A demurrer was interposed to the third, fourth and sixth defense to amendment which was sustained. The defendant excepted. A further motion to make certain portion of the answer more definite and certain was interposed and was sustained. Then a third amendment of the answer was filed, setting up five grounds of defense in connection with the former, leaving the sixth, which had been demurred sustained, out of the case. One of the principal errors alleged, is the sustaining of the demurrer to the sixth defense. It is necessary to consider a few only of the various motions that were made. The sixth defense, as finally demurred to, reads as follows: "For a sixth defense and to so much of said plaintiff alleged cause of action as is founded on the warehouse receipt set forth in said petition, and a copy whereof is marked exhibit A. Said defendant says that he here adopts all the statements contained in his amended fourth defense after the words 'forfeited, and is forfeited,' the same as if here repeated in full." That evidently should have been the third defense, as nothing of the kind appears in the fourth. That reads—coming to that—"said defendant further says that all the flour mentioned in all of said warehouse receipts, was taken by said Lester, or with his consent or by his order from said defendant's warehouse, and that said defendant did not then know, or have reason to know that any other person than said Lester had any interest, whatever, in said flour, nor did the plaintiff then know that defendant had any claim thereon or interest therein. Defendant further says that no part of the loans mentioned in plaintiff's petition was made upon or by reason of said receipt, or the assignment or transfer thereof, or upon the pledge of the same, or the property therein mentioned, until after said property had been taken from the possession of said defendant as aforesaid."

Now, in considering, in connection with that, the charge of the court upon the same subject matter, it is said that even though the court erred in sustaining the demurrer to that, it was cured by the subsequent proceedings upon the trial; that the question was really submitted to the jury and the jury passed upon it.

Special requests were made by the defendant. The court say, "I am asked to charge you that if the jury find from the evidence, that at the time the plaintiff came into possession of any of the warehouse receipts in question, the property purporting to be covered by said receipts, had been already taken away from the custody of the defendant by Lester, without the knowledge or consent

of the defendant—in such a case the transfer of such receipts would not transfer any property or right to the defendant, to the property named in it.”

The court say, “I refuse that charge, not because I condemn  
107 the law that is contained in it, but because I \*think that there is no issue here set up by the defendant to which that charge is applicable.” That is undoubtedly true. There was no issue of that kind, for the very reason that that defense had been stricken out by the sustaining of the demurrer so that it was not saved thus far by the proceedings upon the trial.

The following request was made: “If the jury find from the evidence, that the several warehouse receipts were transferred to the plaintiff by Lester, to secure specific and particular loans or advances and at the time when these loans were paid up, the said receipts were transferred by Lester to the plaintiff to secure other loans or advances, and shall further find that at the time of such last transfer, Lester had taken away the property described in such receipts, without defendant’s knowledge or consent, the plaintiff would have then, no ground of action.” The “court declines to charge,” so the court squarely refused to give that in charge, which would have been somewhat informal, after the sustaining of the demurrer.

This brings us, then, to the discussion of the question of law raised: Does the transfer of a warehouse receipt retained by the owner thereof, after he has repossessed himself of the property represented by it, without authority or knowledge of the warehouseman, and afterwards transferred to him to secure a loan, give to the assignee of the receipt a right to recover as against the warehouseman, the value of the property represented by it?—that is really the question in the case.

Now, we are not without authority, and, perhaps, positive authority, upon the subject. In the case of the Second National Bank of Toledo v. Horace S. Walbridge et al., in the 19th Ohio State, a case quite similar to this was made. In that case it is stated that previous to the 13th of January, 1866, R. Lewis & Son, who were manufacturers of oil, had placed in store with Walbridge & Co., warehousemen, 57 barrels of oil. At the same time, they were indebted to the Second National Bank of Toledo, in a large amount, and were seeking for loans. That they refused those loans unless further security was provided. Thereupon, Richard Lewis, a member of the firm of Lewis & Son, went to the warehouse of Walbridge & Co., with the cashier of the bank, and found there the 57 barrels of oil, lying in one lot in the house.

Previous to this time, Walbridge & Co., had issued to Lewis & Son, a warehouse receipt for 15 barrels, a part of the 57 barrels which had been issued to the bank, and then held by it. Lewis and the cashier went to the warehouse of Walbridge & Co., found a member of the firm, requested him to take up the receipt of the 15 barrels, and issue a new one to Lewis & Son, for the whole 57 barrels, and after finding that the whole number of barrels was in

store, this transfer was made to the bank, "received in store, for the account and at the risk of R. Lewis & Son, 57 barrels of oil, subject to their order or return for the receipt and storage"—almost identical with this receipt in this case. This receipt upon the same day was transferred to the Second National Bank, and to secure the loans and to cover those already made.

Previous, however, to the 13th of January—the date of this other transaction—Walbridge & Co. had issued a warehouse receipt in the usual form, to Lewis & Son, for 42 barrels of oil. And this receipt had been transferred to the firm to secure the loan made to the First National Bank of Toledo. The oil was delivered on the 57 barrels' barrel receipt, and after its delivery to the Second National Bank, the property was taken by replevin, by the First National Bank. On the trial of that case the First National Bank held the property under this former 42 barrel receipt.

It appears further, that this 42 barrel receipt had been given by a clerk of Lewis & Son, without any actual knowledge on the part of the firm that that receipt was out at the time they executed the 57 barrel receipt. In that case, of course, there was the actual negligence on the part of that firm in issuing the first 42 barrel receipt or the 57 barrel receipt thereafter. No bad faith was imputed, no fraud was charged—it was simply a mistake on the part of the firm, in issuing the second receipt, when the first had been already issued by their clerk.

Upon that subject the question came up as to which of those receipts should prevail. That necessitated a discussion of the effect of those receipts, and the court held this legal proposition: "A warehouse receipt is not, in a technical sense, like a bill of exchange, a negotiable instrument; it merely stands in the place of property it represents; and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property."

Judge White, in delivering the opinion of the court, says: "If Lewis & Son had retained the receipt, it is clear that they, upon the facts, could have maintained no action against the defendants. The only question for our determination is whether the plaintiff, as the assignee of the receipt, occupied a better position than Lewis & Son, would have occupied had they retained the receipt?" Then they say further: "This case is clearly distinguishable from cases urged upon our attention, where negotiable paper, invalid between the original parties, has been enforced in favor of a *bona fide* holder for value; also, from the cases where the representation of the defendant has been made directly to the plaintiff, with the view of influencing his conduct." And they proceed to hold that the first party, the First National Bank, in taking that receipt, did secure the property. The Second National Bank was not entitled upon their second receipt to a judgment for the value of that property, there being no privity of contract between the defendant as maker and the plaintiff as assignee of the receipt. The defendant, in the

absence of authority from it, is not estopped from showing as against the plaintiff, the mistake in the issuing of the receipt, as a defense to the action." What now is the case before us? These receipts were in the hands of this bank. The evidence shows that Lester was in the habit of going in and out of this warehouse, where this flour was stored. The answer avers, and it was sought to have the court to charge the jury, that if, in point of fact, when a certain receipt specified in the answer and made part of the petition and referred to, was delivered to the bank, the flour represented by that receipt, had already been taken possession of by Lester, and was not then in Burt's possession, that the extent of that flour, at least, the bank was not entitled to a judgment. It is very difficult to distinguish this case from the one in Toledo. There was a simple case of a mistake. They had issued two receipts, the second one issued without any actual knowledge that the first one was issued. But yet it was binding on the firm—the acts of its clerks—and they held that the first receipt transferred the property to the bank.

Now, if there was no flour in the store when this receipt was given, and if the bank acquired no right of action by virtue of the receipt as commercial paper—as it clearly did not—its only right of action was for the recovery of the value of the flour represented by that receipt, and there <sup>108</sup> was no flour there represented by it. Now the simple act of negligence on the part of Burt, in not taking up that receipt is accounted for, first because he had no knowledge—says this answer, and said the request—that this flour had been taken away from him by Lester.

Now, it would seem to us, that so far as this case is concerned, this bank could not maintain its action upon that receipt. And that state of facts is sought to be made out. We are unable to reach any other conclusion in the case in view of the law so fully and completely settled by the supreme court in the case referred to.

If that be so of course, the court below erred in not permitting that answer to stand, and in not permitting that case to be made to the jury, so, to that extent, the verdict would have been reduced.

A number of questions have been made in the case, but we have not undertaken to dispose of any of them. We shall reverse the case, remand it for another trial, upon the ground stated.

**\*BILLS AND NOTES.**

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[Cuyahoga District Court, 1878.]

A. S. HAYDEN ET AL. v. JOSIAH T. MILLER.

Action on a promissory note in which the defense of usury is set up, and a new trial sought on the ground that the court erred in overruling certain requests of counsel to charge the jury.

WATSON, J.

The action is brought upon a promissory note, which is as follows:

Seneca Falls, New York, August 30, 1873.

Twelve months after date I promise to pay to the order of Cyrus M. Delaney, \$1,000 at the National Exchange Bank of Seneca Falls, value received, with interest. The note is marked as an exhibit and made a part of petition. It is alleged that before the maturity of the note the same was in the usual course of trade, and for a valuable consideration sold, indorsed and transferred to the plaintiff, who has been and still is the *bona fide* owner of the same. The petition says: "When the said note became due and payable, the same was duly presented for payment, and payment thereof refused and said note protested, and indorsers notified according to law. There are no credits to apply on the said note, and there is now due and payable thereon, from the defendant to the plaintiff, the sum of \$1,000, with interest on the same from August 30, 1873, at 7 per cent., which is the legal rate of interest in the state of New York, where said note was made, executed and payable; amounting in all to the sum of \$1,150, with interest on same from October 30, 1875. Said J. C. Delaney is liable as principal and the other defendants are each liable on the said note as indorsers. The plaintiff, therefore, asks judgment," etc. To this petition there is an answer, by the defendant, A. S. Hayden.

In that answer he alleges, as does the plaintiff all through the case, that this was a New York contract, where the legal rate of interest is 7 per cent., and that all paper given for loans in which there was reserved or contracted to be reserved, a greater rate of interest than 7 per cent., were void.

And it is claimed that under that statute and its construction in New York, that such a note or such a contract in the hands of anybody and wherever found is void, and cannot be collected. Upon the issues thus formed the parties went to trial, to a jury.

Testimony was taken and the court charged the jury.

It is claimed on the part of the plaintiff in error, that certain errors intervened; that the court erred in the instructions given to the jury on the trial; that the court erred in directing the jury that they might adjourn over until nine o'clock the next day, after be-

ing in session an hour, if they did not agree, and in other instructions to the jury.

The record shows that at the close of the trial the jury were instructed that after they had been in session for an hour, if they did not agree upon a verdict, they might adjourn until the next morning. That is the second error that is assigned. Then, that the court erred in refusing to give the jury, the propositions, and requests of the defendant below, and in refusing to charge as requested by said defendants; that the court erred in admitting the evidence offered by the said Miller, to which Hayden objected. That the court erred in ruling out the evidence offered by the said Hayden. That the verdict of the jury is against the evidence, that the verdict of the jury is against the law, and the court erred in overruling the said Hayden's motion for a new trial; that the court erred in refusing to grant a new trial, on the ground of newly discovered evidence. And that the said judgment was given for the said Miller, when it ought to have been given for the said  
115 Hayden according to the law of the land.

Now, after the jury was charged (and it was charged at great length), certain propositions, 17 in number, were requested to be made.

The second instruction called for, is this: "It is claimed by the defendants that notwithstanding suit is brought in the name of Miller, it is really the note of Thos. W. Compson, and that it was put into Miller's hands, to enable Compson to collect it. If this is so, then your verdict should be for the defendant. To determine this, you must look at all the facts."

Now, that was given with certain qualifications, as follows: "And the burden of the proof is upon the defendant."

"Mr. Hart: I would prefer to have it given as it is, but would rather have it with qualification, than not at all."

"The Court: I will give it then with the qualification. It is this: It is claimed by the defendant, that notwithstanding the suit is brought in the name of Miller, it is really the note of Thomas W. Compson, and that it was put in Miller's hands to enable Compson to collect it. If this is so, then your verdict should be for the defendant. To determine this you must look at all the facts." That is the instruction. "Now, I say upon that proposition the burden is upon the defendant, as he takes upon himself the burden of proving, that, he must do it by a fair preponderance of evidence, that is evidence outweighing that of the plaintiff."

Now, in looking at that we have come to the conclusion that that was very well calculated to mislead the jury. The proposition was a very simple one, there was no real occasion for adding that qualification at that point. It had been abundantly stated before and attaching it at that point, as a qualification on the part of the court, we regard as saying to them things that were well calculated to mislead.



The fourth proposition is in these words: "Even if you find that the plaintiff was an innocent purchaser, without knowledge of any infirmity in the note, yet he cannot recover against Hayden, if it is a New York contract." That was refused. Then the eighth proposition called for is in these words: "In determining the place where a contract is made, the place where it was delivered as consummating the bargain controls." That was refused. "9th. If the note in question was a New York contract, then the following rules upon the subject of interest and usury apply: If at the time of making this note, there was reserved, or paid, or taken, or agreed to be reserved, or paid, or taken, a rate of interest greater than seven per cent., then the note is void under the law of New York, and cannot be enforced against the defendant, Hayden." This was refused. The tenth proposition: "If you find that three per cent., or \$30, was reserved at the time the loan was made, then the note was usurious." That was refused. However hard the court might struggle to get over the others, when you come down to this 10th proposition, it is difficult to see how it is possible for the court to escape the conclusion that in that there was error. The proposition is clear, it is in no way loaded; it is a fair, simple proposition, and to the effect that the taking of \$30 interest over and above 7 per cent. would make the note usurious, if they found that fact, and that was refused.

This is the 13th proposition: "If the note in suit contains usury or is in any manner tainted with usury in its inception and if Mr. Hayden signed or indorsed it before, or at the time it was first negotiated, and the loan obtained, then he is released." That is refused.

"14th. If you find that more than 7 per cent. was taken or reserved at the time of making the loan, then the note is void. So, also, if you find there was an agreement to take or reserve more than 7 per cent., the note is void."

Now, these are very cleanly cut propositions, they are not encumbered, and they are refused.

This is another that was refused, the 15th: "All parties and their privies to a usurious contract, at the time of its inception, are entitled to make the plea of usury in an action brought to recover upon it, and in this case, if Hayden signed the note without consideration, and simply to enable Delaney to borrow the money of Compson, then Hayden is one of the privies to the contract."

"16th. If you find that Hayden signed this note without consideration, before it was negotiated and before any money was paid, and simply to aid John C. Delaney to raise money upon it from Compson, and if you further find that Compson's loan to Delaney was tainted with usury, then Hayden is entitled to set up the defense of usury, even if Miller was an innocent holder of the note." That was refused.

The 17th proposition is as follows: "If you find from the proof that the object of making the note in question was to obtain

a loan of money from Compson and that Hayden indorsed the note for the accommodation of Delaney, to enable him to borrow the money of Compson, then said Hayden is not a business indorser in the usual course of trade or business; but is to be regarded as one of the original parties to the note, and as such may make the defense of usury; and if said note in its inception is found to be usurious, he is released therefrom, and this is so whether the plaintiff is an innocent holder or not." How gentlemen can expect to carry this judgment over these charges is, to my mind, utterly incomprehensible. There may be some of these charges that have been overruled, that by exercising very great ingenuity, and hunting up reasons, might be got along with and avoided. But there are certain portions of them that are so plain and pointed, and call for instructions so simple and so clearly law, that there is nothing left for us but to reverse the judgment.

Marvin, Hart & Squire for plaintiff in error; Kain & Gary for defendant in error.

### EXECUTORS AND ADMINISTRATORS.

[Cuyahoga District Court, March Term, 1878.]

JAMES W. DAWSON, ET AL. v. AMELIA MIGHTON.

1. A legatee cannot bring an action on an executor's bond for the benefit of the estate in his own name.
2. A change in the prayer of a petition without averments in the body of the petition will not make the petition good.

HALE, J.

This case is pending in this court on a petition in error to reverse the judgment of the court of common pleas. The action was originally commenced in the court of common pleas April 6, 1872, and is founded upon a bond given by the executors. The facts necessary to an understanding of the case, are these: Robert Dawson, the testator, died in May, 1870. His two sons, James and Martin, were appointed his executors, and on the 17th day of April, 1871, gave the bond in suit. The case was pending in this court until February, 1876, when an amended petition was filed. That amended petition sets forth these facts: That Robert Dawson died in 1870; that the two sons were appointed his executors; that they gave bond. The condition of the bond is in the general form of an executor's bond, one of its conditions being, that an inventory shall be made of the property and return within three months, and that the property shall be administered upon according to law. It alleges that the executors received a large amount of property belonging to the estate of the testator, mingled it with their own property, refused to make an inventory of it, \*and finally converted it to their own use; and it specifically sets out what that property was that they neglected to inventory and return. It sets out

the fact that the plaintiff, by the will, was bequeathed \$300; that she is a legatee of the estate in the sum of \$300; and the prayer of the petition, is this: "Wherefore, she prays judgment against the defendants, in favor of and in the name of the state of Ohio, for the sum of \$4,000, being the penalty of the bond."

The action it will be observed, was commenced in the name of the legatee. Summons issued in that way, and return was made.

Now, it becomes necessary to examine some of the statutes relating to the settlement of an estate, in order to a proper appreciation of the case. Section 177 of the act relating to the administration of estates provides, "After a creditor is entitled by law to the payment of his debt from the executors or administrators; and the amount of the claim has either been admitted to be just or allowed by them, or has been ascertained by judgment or award against them, or by an order of distribution, the bond given by them for the discharge of their trust, may be put in suit by such creditor, if the executors or administrators shall neglect, upon demand made by such creditor, to pay such claim." That provides distinctly that where the debt is due and it has been definitely ascertained, and there are assets in the hands of the administrator applicable to the payment of that debt, and the administrator refuses to apply it, the bond may be put in suit and enforced for the benefit of that creditor.

Section 178 provides that when a legacy has become due and payable, and it is definitely ascertained, and that there are assets in the hands of the administrator or executor, applicable to the payment of the legacy, such legatee may resort to the bond for the enforcement of the legacy.

Section 179 provides: "When it shall appear to the court, on the representation of any person interested in the estate of any deceased testator or intestate, that the executor or administrator has failed to perform his duty in any other particular than those above specified in the two preceding sections, the court may authorize any creditor, next of kin, legatee, administrator *de bonis non*, or other person aggrieved by such maladministration, to bring a on the suit bond."

Prior to the enactment of the code, by a statute that had existed since 1816, the suit in either of these cases was prosecuted in the name of the state of Ohio; and then by a second section, it was determined how execution should issue, and for whose benefit. But the action was prosecuted in the name of the state.

At the time this suit was commenced, another action was begun by Jane Dawson, the daughter of the testator, which was tried, and went to the supreme court, upon a petition precisely like the original petition in this case. The Jane Dawson case was an action by the legatee to enforce the payment of a legacy, asking for a specific amount and execution in favor of the plaintiff. The supreme court, in the case of Jane Dawson against these plaintiffs in error, held that the petition did not state facts sufficient to con-

stitute a cause of action, and sent it back on the ground that an action could not be maintained until four years had elapsed, to enforce the payment of a legacy under the 177th section of the statute that I have read. So that this petition, as it now stands, cannot be treated as an action in behalf of the plaintiff to enforce the payment of a specific legacy due the plaintiff.

The next question, then, is whether the action can be maintained in its present shape, under the 179th section, for the benefit of the state, and not enforce this specific legacy. It is contended on the part of the plaintiff below, that the action can be so maintained; it is contended on the part of the defendants below that the action cannot be maintained in its present form.

Now, first, the action, by the original petition in this case, is precisely the action that the supreme court have held cannot be maintained. The amendment incorporated into the amended petition, no averment making it good. If it be an action to enforce the legacy, a demurrer to the amended petition would lie, if it would lie to the original petition. So that we must hold this petition good, as an attempt to enforce the forfeiture of this bond, for the benefit of the estate, or not at all. It is claimed by the plaintiffs below, that section 566 of the code gives such authority.

"When an officer, executor, or administrator, within this state, by misconduct or neglect of duty, forfeits his bond, or renders his sureties liable, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer, executor or administrator and his sureties, to recover the amount to which he may be entitled by reason of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond, etc."

Now, it is said here that this delinquency means the whole delinquency of the bond—the penal part of the bond—the penalty provided by the bond—it means the whole and that any one interested in the case has a right to enforce the bond to its full extent. It will be observed that the language here is "To recover the *amount*,"—the sum to which he may be entitled by reason of the delinquency.

The next section, 567, provides: "A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security, for another delinquency," showing that it was not intended that this should cover the entire action upon the bond.

In our judgment, this section of the statute only provides for the enforcement of the bond that is given to protect a private right that is ascertainable, and the suit maintained for the enforcement of that private right, which relates to a definite sum and the execution issued to collect that definite sum, and that there is no authority in this section of the code to maintain this action in the name of the legatee, for the benefit of the entire estate.

How should the action, then, be brought? The payee of this bond is the state of Ohio, and unless this provision of the code is applicable to the mode in which the action should be brought, there is no other provision in the code than the 27th section which provides: "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

Now, these two sections of the code, in our judgment, took the place of the old statute of 1816, which provided that, in both these instances, suit should be brought in the name of the state; and in our judgment, when it is brought for a private right, definitely ascertained, to be enforced for that private right, the action may be brought under section 566 of the code by the party in interest. When the bond is enforced for \*the benefit of the estate, 117 it should be in the name of the estate, and a legatee is not authorized to enforce the bond for the benefit of the estate. This plaintiff occupies no trust relation to this estate. She is not a trustee of any fund; she has a specific interest here. When the facts exist upon which she may put that bond in suit she may do it in her own name; but when it is put in suit for the benefit of the whole estate, it cannot be done in the name of a legatee or of a debtor.

It will be observed that a demurrer was sustained to this original petition. Now, there is not an allegation in the amended petition that would change its legal effect, except its prayer. The case of Jane Dawson and of this plaintiff below where each brought to enforce a legacy due to each, and a judgment was asked for the amount of the legacy due each. That petition the supreme court said was not good. This amended petition has the same allegation as the original petition, with the exception that it asks in its prayer that judgment be rendered in favor of the state, and in the name of the state, for the whole penal amount of the bond. It is said that that prayer of the petition changes a poor petition to a good one.

Now, we had supposed that we should look to the manner in which the cause of action was stated—to all that was stated, to determine the relief to which the party was entitled; and we think, if the petition was otherwise demurrable, that the prayer would not help the case out. We do not think we would be justified in holding this petition good, which only makes that change, as against the demurrer sustained by the supreme court; and upon this ground judgment below will be reversed.

R. P. & H. C. Ranney and S. Burke for plaintiffs; S. O. Griswold and J. K. Hord for defendant.

**ATTACHMENT.**

[Cuyahoga District Court, March Term, 1878.]

**CLEVELAND SIERRA MINING CO. v. SEARS UNION WATER CO.**

1. Where an attachment is issued and plaintiff seeks to garnishee funds in his own possession, the objection cannot be made by a motion to discharge the attachment process.
2. If a person garnishee funds in his own hands and gets nothing, a motion to discharge does not lie.

HAMILTON, J.

It seems that the Cleveland Sierra Hydraulic Mining Company, as averred in the petition, is a corporation incorporated under the laws of the state of California, and therefore, a foreign corporation. An action is brought by the plaintiff against the defendant, for the use of a certain water course in California, claiming damages in the sum of \$175,000. Process was issued and service had upon the president of the foreign corporation in this city. Subsequently, or perhaps at the same time, an affidavit was made, and an attachment issued, upon the ground that the defendant was a non-resident, and subsequently, an affidavit was filed for a garnishee process, in which it was averred that defendant was indebted to the plaintiff, and that the Cleveland Sierra Mining Co., the name of the plaintiff, has property in its possession or under its control belonging to the defendant, and the question is presented whether a plaintiff can garnishee himself.

The motion is made to discharge the attachment, and to discharge the garnishee process, upon the ground, first, that the return of the sheriff, upon the attachment, shows that no property was attached, he having returned that there was no property which he could get at. The statute provides that a motion may be made to discharge the attachment, as to the property, or a part of it, that has been attached. The motion is not upon the ground of the insufficiency of the affidavit, or upon the ground that the affidavit itself is untrue. In my judgment the party has a right, when he complies with the statute by filing the requisite affidavit—non-residence in this case—to have an attachment issued, and whether he gets anything or not, is entirely immaterial; he has the right to this remedial process. We cannot discharge the attachment because he did not succeed in getting anything. The affidavit shows that the plaintiff and the garnishee are one and the same. It is a very novel question whether a party can garnishee himself. The language of the statute is, that he may have this garnishee process, whenever he shall file an affidavit stating that any person or any corporation is indebted to the defendant, and this affidavit shows that fact. But it happens to be the plaintiff in this case, and the argument, I suppose, is, there are certain contingencies in which it becomes necessary for a garnishee to be sued; the plaintiff may

sue the garnishee, if his answer is unsatisfactory; that in some sense it is an adverse proceeding, and that the plaintiff, cannot, therefore, take process against the garnishee, when that garnishee happens to be himself. The attachment in this case was properly issued. This motion is a motion to discharge the attachment process, and does not reach the property attached and cannot be granted in that form.

Ranneys and M. R. Keith for plaintiff; Willey, Sherman & Hoyt for defendant.

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### CURTESY—PLEADING.

[Cuyahoga District Court, March Term, 1878.]

DORA SMITH ET AL. V. PATRICK SMITH.

Defenses of a tenant by the curtesy to a claim that he had forfeited the land by not paying taxes, that the land was his and put in his wife's name for convenience only and that he had redeemed from the tax sale, must be separated and numbered, being separate and distinct defenses.

HAMILTON, J.

This is an action in which the plaintiffs set up that they are the heirs at law of their mother, deceased, and that their father held the title to a certain parcel of land, as tenant by the curtesy. That he has been in the possession of it for some time, receiving the rents and profits, and they say he permitted the taxes to become delinquent; that the property was sold; that he failed for a year after the sale to redeem the property thus sold for taxes; that he has thus, under the statute, forfeited his right to his tenancy by the curtesy, and that they are, therefore, entitled to the rents and profits of the property, and to have this tenancy by the curtesy declared forfeited and void, and that they be quieted in their rights of occupancy and possession of the property. The equity powers of the court are invoked by way of an injunction to restrain him in any way from interfering with the property.

The defense set up in the answer is, first, that the property was bought by the defendant himself, with his own means; that it was placed in the name of his wife for convenience, and for the joint use of himself and his wife and to the survivors of them; leaving as it were, a sort of resulting trust in his favor; that he is the equitable owner of this property, and entitled to the rents and profits of it, and therefore, not a tenant by the curtesy at all, and for that reason should have his rights protected.

He says, if that, however, shall not be found to be well taken, and that he is really the tenant by the curtesy, (and he says he has subsequently paid these taxes, and redeemed the land from this tax sale), that there were certain proceedings between him and the administrator of his deceased wife, by which he placed certain

funds in the hands of the administrator, for the express purpose of redeeming this land, and that from the fraud of the administrator, the taxes were not paid, and it was, therefore, sold; that as soon as it came to his notice, the first notice being the bringing of this action, he immediately took up the tax title, and that he ought, therefore, to be remitted to his rights as a tenant by the curtesy.

The motion is made to require the defendant to separately state and number these defenses. We are of the opinion that there are  
118 two distinct \*defenses and that they should be stated separately, and the motion is granted.

Street & Deweese for plaintiff; Grannis & Griswold for defendant.

### AMENDMENTS.

[Cuyahoga District Court, March Term, 1878.]

THE LAKE ERIE ICE CO. V. GRO. ROSE ET AL.

A suit in equity to enjoin the commission of a trespass may, by amendment be converted into an action at law to recover damages for the same trespass and so, though the date of the trespass is not the same, when the court are satisfied that the same transaction was intended, and such amendment does not make it a new and different action.

HAMILTON, J.

A motion was made in this case to strike the amended petition from the files. The original action was brought for the purpose of obtaining an injunction, restraining the defendant from entering upon certain premises, for the purpose of getting ice.

Upon the hearing of the application for an injunction, the injunction was refused. Leave was then taken to amend the petition, to make it an action for the recovery of money. It is objected that the form of action cannot be changed from an equitable action to a legal action; but we are of the opinion that it would have been perfectly competent, if the court had acquired jurisdiction in the original action, to have gone on and given such damages, as, in the judgment of the court, the facts might warrant; and being the same transaction, we think the petition may be so amended, the parties being in court, as to make it strictly a legal action, instead of sending them out of court to commence the action over again.

It is said that it is a new and different action, because the averment in the original petition was, that the trespass set out was on the 25th day of January, 1876, while in the amended petition it is averred to be on the 26th day of the month; that a trespass on one day, and a trespass on another, would be separate and distinct causes of action. But on looking these petitions over, and comparing them, we find that the trespass is alleged to have taken place upon the same premises, the description of the trespass is the same, the time is the same, with the single exception that in the one it is



averred to be on the 25th, and in the other the 26th day of the month; it is the opinion of the court, that it is intended to be the same transaction; and that the description, naming the 26th instead of the 25th, was, perhaps, a clerical error, and the mere fact that it was alleged to be on that day, would not be very material, if it is the same. We are satisfied it is the same on an inspection of the papers.

Grannis & Griswold for plaintiff; Andrews & Kaiser for defendants.

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### DAMAGES.

[Cuyahoga District Court, March Term, 1878.]

JOHNSON MCFARLAND V. EUGENE ROBY.

In an action for damages to a buggy, caused by a negligent collision, a general averment of damages to a specified amount is sufficient without setting out the items of injury.

This was an action to recover damages growing out of a collision, for an injury to a buggy, caused by the alleged careless driving of the defendant. The petition specified certain items of damage to the buggy, and the cost of those items, and stated that there was other damage done to the buggy, to the extent of \$27.00

A motion was made to require the plaintiff to specify the items of damage, to which the \$27. item referred. The motion by the court, Hamilton, J., was overruled, holding that a general averment of damage to the buggy would have been sufficient without setting out the items in which it consisted.

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### \*DEATH BY WRONGFUL ACT.

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[Cuyahoga District Court, March Term, 1878.]

Watson, Hale and Tibbals, JJ.

WILLIAM I. HUDSON V. WILLIAM ADIN.

A pending action for wrongfully causing death is not abated by the death of the defendant, but survives against the administrator.

WATSON, J.

This action was brought in the court below by the plaintiff, as administrator of the estate of Hattie M'Kay, deceased, under the act of March, 25th, 1851. The title of that act is (and we may look at the title of an act, although it is not a part of it, when we seek to give to it a construction), "An act requiring compensation for causing death by wrongful act, neglect or default." The first section of the act provides, "Whenever the death of a person

shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof; then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued; shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter."

The second section provides, who shall bring an action. It shall be brought in the name of the administrator of the deceased person, and it shall be brought for the benefit of the widow and next of kin.

Now, in this action which was brought in the lifetime of the defendant, and after a demurrer was overruled, an answer was filed denying all of the allegations of the petition. After the death of Adin, the defendant, in the action, as originally commenced, J. T. Lobe, was appointed his administrator, and the action then proceeded against him. It is now claimed that by the death of Adin, the cause of action abated and that it can no longer be maintained upon the ground that it is substantially an action for an assault and battery. After the death of Adin, and the appointment of an administrator, a supplemental answer was filed, and that is a plea in abatement, setting up the death of Adin as abating the action. To that answer there was a demurrer upon the ground that it did not constitute a defense to the cause of action set up in the petition.

That demurrer was overruled, and the defendant, as administrator, had judgment accordingly. To that exception was taken, and it is brought here upon error. The question now arising is, whether the death of Adin did abate that action?

Now, what is the nature of the action as it was pending in the court below? Was it an action for trespass for an assault and battery? It is argued upon the hypothesis that it is such, and that that being the nature of the wrong committed, the cause of action abates by that death. Now, is that true? We think that it is not. It is not an action for an assault and battery. It is an action under a special statute, and that statute gives compensation for what? Why, it is for causing death, and for causing death by wrongful act, neglect or default, and such wrongful act, neglect, or default, as would give a right of action against the original defendant, if the party had lived. The action, when brought by the administrator to recover, is not for the benefit of the estate. The gist of the action is for causing death, and causing death by a wrongful act, or causing death by a neglect, or by a default. When those facts concur, there is a statutory liability and the benefit of that liability does not pass to the personal representative for the benefit of the estate. Creditors have no interest in it. Those having claims upon the estate, in any form, have no interest in it. It is for the benefit of the widow and

the next of kin. It is to be prosecuted in the name of the administrator. It is a creation of the statute, and unless the statute itself prescribes the abatement of this action, no abatement follows from any rule of the common law. We think then, that the supplemental answer that was filed here in abatement, was not a ground of defense that would abate the action in the court below. That cause of action is given by statute. It is a peculiar creation of the statute, and when death ensues under the proper condition, the right of action accrues, (and it does not accrue before), to the widow or next of kin, who may enforce their rights, through an administrator. No death of plaintiff is here. It is only whether the death of the defendant shall abate it. Now, his short coming is causing death; and this statute is to give compensation for that causing of death, and to give it to the parties that are left unprotected by that death, who are entitled to the benefit of the service and aid, the society and comforts that are to be derived from the benefit of the deceased, if in life.

With these views, it remains only for us to reverse the judgment given for the defendant, on his supplemental answer, and remand the case for further proceedings.

Mr. Heisley: Ought there not to be an express reversion of the order of the court, made in regard to delivering the attached property to the administrator of Adin?

The Court: We have not investigated that. We have treated that as out of the case.

Mr. Heisley: To reverse the whole judgment?

The Court: The whole thing is reversed.

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### NUISANCE.

[Cuyahoga District Court, March Term, 1878.]

J. H. SARGENT ET AL. V. CITY OF CLEVELAND, ET AL.

A lot at the junction of two streets marked "public ground" on the plat, being too small for "public square," will not be deemed one, and not being dedicated as a street is not a nuisance for the city to put the street commissioner's office on it.

The action in this case was brought to abate a nuisance alleged to have been created by the defendants by erecting upon "public grounds," adjoining the lands of the plaintiffs, a certain wooden building, occupied by the assistant street commissioner, of the city of Cleveland, as his office. The decision of the court, by Watson, J., after reciting the allegations of the petition, was as follows:

The question in this case comes up on error in sustaining a demurrer to the petition. On this question the court has not been in harmony. The decision I now give is a majority decision. For my own part I am exceedingly clear on the question. It has not been so with all my brethren. Here is a dedication of streets:

Two streets come together, having a junction. Although the map does not show the fact, they probably cross each other, but be that as it may, the one is Columbus and the other Pearl street. These plaintiffs own a piece of land, distant about 180 feet. The plaintiffs have marked the distance as 65 feet. Columbus and Pearl streets diverge from the point of this public ground. "Public ground" is marked on the plat with no words of dedication, but the petition avers that in the body of the act of dedication it is written, "public grounds," though not marked upon the plat. We are told by the supreme court, in the Lebanon case, that where lands, a lot, or lots are dedicated, and the lot, or lots may be suitable in location, dimensions and form for a public square, that such a dedication will give it as a public square. The converse of the proposition we are to reason out; that where it is not so, that it is not a public square. It is further true, that where a dedication is made in this form, the control and the protection of the ground belongs to the constituted authorities of the city, or town, or village, or corporate authorities. Now, this is one of the lightest things to raise a controversy about, that I have met with. I have not made figures on it to show its contents, but it certainly does not exceed 1-10 of an acre. It would not make much of a promenade, it certainly would not make much of a park. It certainly can not be looked to as pleasure grounds, then what is it for? It is given to the public. It is given to the public for the public use. What is it fit for? and who is to decide that question? I take it for granted that the corporate authorities are to decide the question; and when they have decided it, that ends the controversy about what it is for. They must determine it. It is fit for nothing in the world, except such a use as they apply it to—a place to dispose of the scrapers, ploughs, picks and shovels, and for an office for the street commissioner, a place to deposit and keep safely such things as are used for the public servants, where they can transact their business. If anybody can find any other use for which it is suitable, he can do more than I can. The corporate authorities have so adjudged this case; they have adjudged it to that use; they have applied it to that use, and nobody has a right to complain. These plaintiffs complain that they cannot pass over it, and they say it is being used as a way over which people pass from Columbus to Pearl street; and they complain that this structure is within two feet of their south line, and obstructs their passage onto and over it, and cuts them off, to some extent, from the remainder of the city. They evidently expect to use this as a street. It certainly was never dedicated to a street; there is a street east of it; there is a street west of it; it is all street south of it; it is street all around it. Now, if this was to be improved as pleasure grounds, you have to pave it. There would be about 260 feet of paving to make. It is a pretty dear whistle to make the most or best of it, and apply it to what you please—a pretty expensive little gift. Now, I can conceive of no earthly claim these parties have to keep

that open. The public, have used it for the only use to which it can be fairly and reasonably put. With these views, the majority of us, have come to the conclusion that it is our duty to sustain this demurrer, or, in other words, affirm the decision of the court below.

Marvin, Hart & Squire for the plaintiff; Heisley and Weh for the city.

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### REPLEVIN.

[Cuyahoga Common Pleas, May Term, 1878.]

†CORNELIUS DONAHUE v. E. S. HOLKINS.

In a case of replevin where the plaintiff fails to appear, the defendant, with the assent of the court cannot, without the intervention of a jury, assess the damage for the defendant.

HAMILTON, J.

The motion is made in this case to vacate a judgment rendered at a former term of this court. The case was tried before a justice of the peace and came into this court by appeal, and is a case of replevin. The petition was filed in this court by the plaintiff, but through some misunderstanding as to who were his counsel, or from some other cause, nothing further was done by way of prosecuting the claim of the plaintiff. The defendant joined issue by answer. At the time of the trial, no one appearing for the plaintiff, he was called and the action was dismissed, whereupon the case was submitted to the court for the assessment of the damages of the defendant. The ground of the motion is, that it was error for the court to assess damages without the intervention of a jury. The supreme court in the 12th Ohio State, decided under section 184 of the code, in relation to replevin, that a jury must be called, and that the court could not make the assessment of damages. That is a provision that where issue is joined, and shall be found by a jury with the defendant, then they shall go on and determine who has the right of property and the right of possession, and assess the damages accordingly. Under section 183, in case judgment should be given for the defendant on demurrer, or on failure to prosecute the action by the plaintiff, or otherwise upon application of the defendant, a jury shall be called, and they shall assess the damages of the defendant. We are inclined to think, under this ruling in the 12th Ohio State, that a jury should be called in all cases of this character. We are referred to section 279, which provides that when issue is joined, the parties may waive a jury by consent, or if one of the parties is absent, with the consent of the other party, a jury may be waived, and the court may take an assessment of

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†See 2 Cleveland, 114.

damages. That is a general provision, and if that was all there was on the subject, we think an assessment might have been made by the court. But here is a special provision, providing for a jury in these cases, and we think the ruling in the 12th Ohio State, by analogy, extends also to section 183, and this motion should be granted.

Gollier & Brand for motion; W. C. Rogers for defendant.

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### INTEREST AND USURY.

[Cuyahoga Common Pleas, May Term, 1878.]

M. STRASS v. CHRISTINA BINDER ET AL.

An answer of a defendant in a foreclosure suit, where the petitioner avers to have an interest, merely setting up usury in the consideration of a plaintiff's claim, without showing any interest in himself is bad, and is demurrable, for he appears as a mere volunteer.

HAMILTON, J.

This is an action brought in this court to foreclose a mortgage given to secure certain notes executed by the main defendant, Christina Binder. Several other parties were made defendants, and among the rest, A. Biam, who was called upon by the petition to state what interest he has in the premises. He comes in by answer, and simply avers there was usury in this note given by the chief defendant, Binder, to the plaintiff in this action, and plaintiff's assignor, without setting up that he has any interest whatever in the premises. A demurrer is interposed upon the ground that it does not appear by his answer that he is in any way interested in the premises, and, therefore, that it is no concern of his whether or not there was usury in the transaction between the plaintiff and the main defendant. We think the demurrer is well taken.

Grannis & Griswold and Straus for plaintiff; Cowan for Byam.

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### PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

WILLIAM THOMAS v. FRANK CLINE.

An answer denying all the material averments of the petition is defective and may be taken advantage of by motion to make more definite and certain.

HAMILTON, J.

This is an action to foreclose a mortgage upon certain premises, the mortgage securing certain notes. The main defendant comes in and answers by a general denial, setting up that he denies all the material averments in the petition. The motion is made to make the

answer more specific and certain by specifying what he regards as the material averments in the petition. We think the motion is well taken. The law is well settled, and was settled as early as the 10th Ohio State, that averments in an answer which are not good can be taken advantage of by a motion to make more specific and certain. The averment that the defendant denies the material averments in the petition, leaves it \*entirely with him to say 124 in the future that he did not regard this, that or the other as material. He must set out the facts and specify, definitely, what he denies. The motion is granted.

H. C. White for plaintiff; Eager and Robinson for defendant.

### PLEADING—VACATION OF DECREE.

[Cuyahoga Common Pleas, May Term, 1878.]

SAMUEL HITTELL v. L. G. SMITH ET AL.

A petition to vacate a decree made at a former term, which states that the decree was made in the violation of the terms of a certain agreement, is open to a motion to make definite and certain by stating the terms of the agreement.

HAMILTON, J.

This case comes into this court upon a petition to vacate a decree had at a former term of this court against certain land, a building, stone quarry and mill, with a large quantity of machinery in it, belonging to the plaintiff, Hittell, in an action wherein L. G. Smith was plaintiff and Hittell, and others were defendants. The ground upon which the vacation of the decree is asked, is, that it is taken sometime, a year or more, after the action was commenced, and before trial, upon an agreement between the then plaintiff and the defendant, that in case the matter was not adjusted before a certain day, a decree or foreclosure might be had. That day passed, and the decree foreclosure was had, and it was said to be in violation of the terms of the agreement by which it was consented that a decree might be taken. The objection is that the agreement is not set out, and a motion is made to make the petition more definite and certain by setting out specifically what that agreement was, and averring in what particulars the agreement was not carried out. It does not appear from the petition that this agreement is sufficiently set out. There is no attempt to set out the agreement itself, and we think it should be more specific and certain in this respect. The motion will, therefore, be granted.

Buckner and Bentley for plaintiff; Ingersoll & Williamson for defendant.

**PLEADING—INJURY.**

[Cuyahoga Common Pleas, May Term, 1878.]

**JOHN HAGGERTY v. THE L. S. & M. S. RY. CO.**

A petition for damages for injury caused to plaintiff in running a handcar while in defendant's employ, need not state the precise time and position he was in when the accident occurred, and whether he had got fully on the car or not.

This is an action brought in this court by the plaintiff for an injury caused while in the employ of the defendant, in running a certain handcar, while employed as a construction hand in making repairs on the road. The motion is made to require the plaintiff to set out specifically at what precise time or in what precise position he was when the accident occurred, it being averred in the petition that it was while he was attempting to get upon the handcar, after it had been started in motion by the section boss, and in obedience to his orders, while he was thus attempting to get upon the handcar and about the time he seized hold of the handle and commenced to turn it, this accident occurred through the faulty construction of the car, which is averred to have been old, rickety and out of order, and known to be so. The motion is to require the plaintiff to specify whether he had, when the injury occurred, got fully upon the car, or whether it was just after he had got upon it and had seized hold of the handle. We think the petition is sufficiently definite and certain to appraise the defendant of all that to which it is reasonably entitled, and the motion will be overruled.

Reid and Smith & Cooke for plaintiff; Mason and Andrews & Kaiser for defendant.

[Hamilton District Court.]

**RUTHERFORD & CO. v. CINCINNATI & PORTSMOUTH RY. CO.**

For opinion in this case, see 6 Rec., 758.

**\*CONTRACTS—EVIDENCE.**

[Cuyahoga District Court, March Term, 1878.]

**ROBERT CLEMENTS v. BALDWIN QUARRY CO.**

Lemmon and Rouse, JJ.

When words are used in a contract which involve a latent ambiguity, the conversations between the parties, at the time they are negotiating the contract, may be given in evidence for the purpose of showing the meaning which they attached to the words used in the contract, at the time it was made.—[ED. LAW REPORTER.]

LEMMON, J.

This case was submitted to us by counsel in a somewhat informal way, in the consultation room, yesterday, at so late an hour in the term as gives us not that opportunity to make an examination of the subjects presented that we would have preferred.



The questions submitted are questions that are not very well settled, involves a close and rather interesting question of practices. We have been much pleased to have had an opportunity of further, more particular and full consideration of the subject, both for the purpose of satisfying ourselves upon the bearings and for the purpose of examining the authorities. We have, however, stated the matter to counsel who are engaged in the case, and who know what their wishes are better, perhaps, than we can anticipate them, and who say they feel anxious to have a decision announced, and that being the case, we will give them the best decision we can arrive at, saying that one member of the court, at least, feels great hesitation—both of us, indeed,—at pronouncing a decision with so brief an opportunity for an examination, and so partial an examination of the authorities bearing upon the case.

The principal question in this case, is whether testimony which was offered by the defendant in the case upon trial in the court of common pleas, and which was objected to and ruled out by the judge trying the case there, should have been admitted, whether the ruling of the court in this portion of the case can be sustained, or whether it should be overruled.

We have little doubt, from the examination we have made of the case, but what the justice of the case would have required that this testimony should have been admitted; but we feel that it is necessary that something more than this should be found by us before we could reverse this case: for, if the court below, in trying the case, have held the principle of law applicable to the admission of evidence in the case correctly, we feel that there is no responsibility for the results to which a correct application of principles of law tend, and it brings us to the question as to whether the law, as ruled by the court, is to remain as the law in this case with us, or whether we upon reviewal, shall hold that the case could be reversed.

Upon the trial of this case, the question between the parties, sought to be made by this evidence, was as to the meaning of the word *perch* contained in the written contract of the parties. There was evidence given tending to show that the word *perch*, as used in railroad works, meant twenty-five feet, and that the word *perch*, as used among builders in the construction of houses, meant sixteen and one-half feet; and the evidence seems to have been uniform, that, as these two kinds of work, the word in one case meant twenty-five, and in the other sixteen and one-half feet. The contract is for stone for the building of a bridge by the county commissioners of Cuyahoga county, and is neither railroad works upon the one hand, nor house work upon the other, and it involves the construction to be placed upon the word *perch* as used in this written contract.

The defendant in the case offered upon the trial a witness by the name of Graves, who was the attorney employed by the parties to draft this contract; and while this witness was upon the stand,

he was inquired of what was said between the parties to the contract, when they gave directions to him as to how he should draw it, as to the meaning of the word *perch*. I will refer to the brief. As to these particular matters, the brief says:

131 "After the testimony of contractor, experts and stone men had been closed, the defendant put upon the stand as \*a witness Thomas Graves, who reduced this contract to writing as it was signed by the parties and sued upon in the action, who testified that the paper presented was the contract written by him, except the signature and a few words at the bottom; that Clements and LeDuk, one of the plaintiffs, came to the office; that instructions were given as to part of this contract by the parties present; could not tell which gave them. Counsel for defendant then asked this question: 'What instructions were given to you when both parties were present with reference to so much of the contract as relates to the *perch*?' Plaintiff objected, the court sustained the objection, and defendants excepted. Counsel then stated: 'This question is asked for the purpose of showing that at the time the contract was reduced to writing by the witness on the stand, in the presence of both parties, that such instructions were given to the witness, who was then writing the contract, that would show that they both understood the term *perch*, as used in that contract, meant 25 feet and not other measurement.' The witness, after being asked who gave the instructions and having stated that one of the parties gave to him a written memorandum of what he was to reduce to writing, was asked the following: 'At whose suggestion did you use the term *perch*, in making this written agreement?' Plaintiff objected. Objection sustained. Defendant excepted. Counsel then stated this question, he asked the witness for the purpose of showing that the term *perch* was used there by the witness at the time of writing the agreement without instruction from either party—that the attorney put in the word *perch* without instruction from either party, but he had reduced the agreement which had been used—he had reduced the memorandum which had been used and delivered to him by the parties—the feet mentioned there to perches—at his own instance and on his own motion, and that was made upon the occasion.

The computation was made upon the basis of eighteen cents per foot, and twenty-five cents per perch.

"Also the following question: 'When you inserted the word *perch* in the written agreement between these parties, was it at the suggestion of either party, or was it written by you there at your own suggestion or upon your own motion?'

"Plaintiff objected. Objection sustained, and defendant excepted.

"Counsel then stated: 'This question is put to the witness for the purpose of showing, and the defendant expects to prove by the witness in answer to this question, that the word *perch* was not used by either of the parties in any instructions given to the

witness, and that he used it in the written contract—the word *perch* upon his own responsibility.’

“Counsel then put the following question: ‘For what reason and why did you insert the term *perch* in that written agreement as it was written by you?’

“Plaintiff objected. Objection sustained. Defendant excepted.

“Counsel then stated: ‘We wish to prove by the witness, in answer to this question, that, during the interview between the parties and the witness, the term *perch* was at no time used; but that the statements and the memorandum given to the witness showed the contract to be so much per foot, and that the term *perch* was used by the witness alone without any instructions from either party.’ ”

The bill of exceptions then proceeds to show that questions of that character were put to defendant when called as rebutting witness. They were each also objected to by plaintiff, objection sustained, and defendant excepted.

This raises the question whether, when a word or words are used in a contract between parties, which have a different meaning—when the word involves a latent ambiguity—the conversations between parties, to the contract, at the time they are negotiating the contract, and forming the contract, may be given in evidence for the purpose of showing the meaning which they attached in the contract to the words; or, in other words, for the purpose of showing the meaning of the contract as they understood it at the time, as written.

We are referred to a case in the 40th Vermont Reports, which it is claimed, is directly decisive of the question before us. That is a case in which the question arose as to the measurement of some tunnel work. The syllabus of the case contains the following:

“The plaintiffs and the defendant, having entered into a written contract by which the plaintiffs were to cut and fit the stone for walls of a tunnel, at a specified price per foot, ‘the face of the work that shows to be measured, and none else.’ ”

The question that was made between the parties in that case was as to whether merely the perpendicular front of the wall, measured as a whole, should be considered, or whether the entire cut facings of the stone work which were in suit, including angles and joining of the work, etc., should be measured; and it involves the construction to be placed upon those words of the contract.

Now, upon the trial of that case, on this point, the defendant also offered to show what was said in the original negotiations between the parties, prior to the execution of the written contract, as to how the measurement should be made, or what *face measurement* meant; which offer, on the objection of the plaintiff, the referee overruled.

The court, in deciding the case, in speaking of this point, say:

The plaintiff gave parol evidence tending to show that the meaning of the term *face of the work* would include all the cut and

ressed surface described in that report and claimed by the plaintiffs as proper to be measured, and the defendant gave evidence of an opposite character, tending to show that the words only mean the perpendicular fronts of the wall. The referee found the meaning of these words as the plaintiff claimed; but the referee excluded evidence offered by the defendant as to what was said in the oral negotiations between the parties prior to the execution of the written contract, as to how the measurement should be made or what *face measurement means*. It is a general rule that, when a contract is reduced to writing, previous verbal declarations of the parties in the course of their negotiations become merged in the written contract, and the parties are bound only by the language of the written contract, so far as the construction of the contract affects their rights under it. In general, the same rule applies where technical words or terms of art are used in the contract, or in other cases. In the latter case, however, if the words are peculiar to the art or trade to which the contract applies, it is competent to show by parol the sense in which the words are used and understood in that art or trade generally. When this is shown, the words are to be taken in that sense and thus the contract speaks for itself. But if, from such evidence it appears that the words in question, as generally used as applicable to the subject, apply indifferently to two or more things or objects; it is open to proof showing to which object or subject the contract in question applies, as it does not contradict the sense in which the words are generally used, as previously proved. Such is the case of *Hart v. \*Hammett*, 18 Vt., 127,

so much relied on by defendant's counsel. That was a case of the sale of a quantity of oil, expressed in the written contract as 'winter strained lamp oil.' It was proved that these words, as generally used in the oil trade, apply indifferently to winter strained sperm lamp oil and to winter strained whale lamp oil, and that the latter is inferior to the former in quality. The defendant, subsequent to the execution of the contract, delivered winter strained whale lamp oil. In this state of the case, parol evidence was held to be admissible to show that at the time the contract was executed, the defendant exhibited to the plaintiff, a sample of the oil to be delivered and informed him that it was not sperm oil.'

"That was substantially a question of identity of the subject matter of the sale. The principle recognized in that case does not warrant the admission of the evidence in this case excluded by the referee. That evidence was properly excluded. The plaintiffs are, therefore, entitled to recover on the basis of the larger measurement."

We have also examined the case which the court there refer to, the 18th Vermont; and we think this case a rather well considered case. The case is brief, and we will simply read so much of it as applies directly to this question:

"On the trial, evidence was given by the plaintiff tending to prove that dealers in oil sometimes understand that the kind of oil

specified in the written contract means winter strained sperm lamp oil, and that sometimes the term *winter strained lamp oil* means either whale or sperm oil. In this state of the case evidence was offered to show how the parties understood the term *winter strained lamp oil*, as used in this contract; and the first question to be disposed of relates to the admissibility of such evidence. It is claimed in argument that it was competent for the plaintiff to show by parol evidence the sense in which the words *winter strained lamp oil* by the usage of trade are understood, and that they mean winter strained sperm lamp oil. Of this we have no doubt.

"But it is said that this will not open the door so as to permit the defendant to show by parol the sense in which the parties understood the terms when they entered into the contract. That it was competent for him to show by parol that the terms, by the usage of trade, included both sperm and whale oil no one can doubt. The object in admitting proof of usage in such case is that effect may be given to the contract according to the intent of the parties. Can there be any sound objection to the defendants showing, by parol, the sense in which the terms were in fact used by the parties, when making the contract?"

The court then proceed to argue this question. They cite, in defense of the position which they arrive at, 1st Phillips on Evidence, 531, and Cowans & Hills notes thereto. They hold that parol evidence of the conversation between the parties at the time they were making the written contract was admissible for the purpose of showing the meaning which they at that time attached to the words used in the contract; in other words, to show the meaning which they understood the words in which they had placed the contracts to have.

We find another case that discusses this same question, decided by Judge Story, and reported in the 1st of Story's Reports. It is the case of Harper & Brothers v. Gray, page 574. That was a case of a printing contract. Judge Story says, in summing up the case to the jury (page 588):

"It appears to me that the words of the written contract 'at the cost thereof'—and the question between the parties in this case was as to the meaning of the word cost, one holding that it meant cost of the paper, the ink and the binding, the other holding that, in addition to that, there ought to be computed the cost to the party who held the patent upon the works written. The case was Spark's Biography. The court say: 'It appears to me that the words of the written contract 'at the cost thereof' ought to be construed 'all the cost of the copies,' including the allowance to Mr. Sparks, unless it is clearly made out in the evidence that the parties, in the use of this language, adopted a different construction and limited the cost to the mere expense of the paper, press work and binding. I do not think that it was absolutely incompetent for the parties to show, from the conversation between them at the time of making the contract, what was the sense in which

they then understood the word cost as used in the contract, as it is a word capable of a larger or narrower construction, according to the subject matter and the circumstance of the particular case. Those conversations may be deemed a part of the *res gestae*, and thus may be referred to, as explanatory of the real intentions of the parties, in the use of the word. It appears, however, that the parties, etc."

Greenleaf, in the first volume of his work upon Evidence, lays down language sufficiently broad also to reach the same conclusion, and cites in a note this case from Story.

Now, these are the only cases to which we have been referred, or which we have seen in the case; and in the application to this case of the authorities thus examined, it becomes a question as to whether this case is to be found assimilated to the one in the 40th Vermont, in which the words that were sought to be explained were the *face*—the measurement of the *face*—the *face* of the work only is to be considered and measured;—or whether it is more nearly like the case in 18th Vermont, which is cited in the 40th Vermont approvingly, and which the court reconcile with the decision which they make in 40th Vermont;—whether this case is more nearly in principle with the case in 18th Vermont and the case decided by Story. We have been unable to reconcile these cases upon the statement of the supreme court in 40th Vermont that the case in the 18th Vermont was a case of identity, unless the court used the word identity there for the purpose of expressing not any particular oil, but a particular brand or quality of oil;—it is not in any other sense a question of identity. But we do see this difference—it is, perhaps, not clear, but it is a difference which runs between these cases, and it is the only distinction we can take between them; the word that was used in the case in Story's Reports, the Harper case, was the word *cost*, and the question was simply as to the meaning, more or less extensive, of that word *cost*. It was capable of an extended meaning and of a limited meaning; and, for the purpose of determining the sense in which it was used in that contract, the court say that they will hear evidence of what the parties themselves, at the time they were making the contract, said, for the purpose of fixing the meaning which they attached to the word.

The case in 40th Vermont differs from that in this: There the question did not involve the construction of a word which might be used and which did express different meanings in different relations, but it was to get at the meaning of the parties—not words which they had employed which had no definite meanings but in words—in the sentence which they had constructed of words which have fixed meaning; and in that case the court held, and it seems  
133 to us very properly, \*that the parties should not be allowed to resort to parol evidence for the purpose of explaining the meaning of words which were of themselves sufficiently clear. At least, they would not allow the doubtful experiment to be resorted

to of giving parol evidence of conversations between parties while they were negotiating the contract to be applied so broadly as to the language of the contract, as distinguished from the explanation of a particular word in the contract, and we think that the limitation there imposed was one which necessarily must be imposed. To hold otherwise, would be to allow parties who have been negotiating a considerable time in regard to a matter, and have finally settled upon a contract which they have reduced to writing—it would be allowing all these conversations, and perhaps conversations that would indicate in law a contract which had been refused by the parties, to overrule contract which they had actually made and agreed upon—made up and signed between them—made and adopted as their contract.

This case in the 18th Vermont, is a case where the oil that was spoken of by the parties was winter strained lamp oil, and the question was whether that meant sperm winter strained oil, or whether it meant whale winter strained oil. It was lamp oil in either case, and the question was whether it was better quality of sperm winter strained lamp oil, or that secondary quality of whale winter strained lamp oil; and the court there, for the purpose of showing the quality which the parties understood by the term, allowed parol evidence of what was said between the parties at the time of making the contract to be given in evidence for the purpose of showing the meaning which they attached to that description of the article.

Applying the doctrine in that case to this, (and we are unable to distinguish clearly between that case and the one at bar, re-enforced as it is by the opinion of Judge Story), we think the court below erred in refusing in this case to allow the party to prove, by the attorney who was employed to draft the contract between the parties, what the written instructions which the parties themselves left with him were, and what the conversations in regard to it were that were had in the presence of the attorney, between the parties to the contract, at the time of making the contract.

We think, therefore, although we feel great hesitation in deciding this case with so little opportunity for examination that the case is more nearly like that in the 18th Vermont and in Story's Reports, and must be assimilated to those cases, and that this testimony should have been admitted upon the trial of the case. As at present advised, then, we will reverse this case.

J. K. Hord for plaintiff; S. J. Andrews, and E. J. Estep for defendant.

**BILLS AND NOTES—INSURANCE.**

[Cuyahoga Common Pleas, May Term, 1878.]

**AMERICAN INS. CO. V. HARRY SORTER ET AL.**

1. A note given by the trustees of a church to pay for insurance premiums on the church and signed by them with their own names "as trustees," the association not being named, binds the trustees personally.
2. Where a premium note provides that the charter of the company is part of the contract, and the charter provides that the company should not be liable while an installment of the premium note is overdue, is no defense to an action on the note, and the liability of the maker of the note remains the same.
3. A statement of an agent of the company that a policy which is for a certain number of years, is a policy from year to year, and can be terminated by the refusal to pay installments on the premium note, is a mere opinion and no defense to an action on the note.

HAMILTON, J.

This action was brought originally before a justice of the peace, and comes into this court by appeal. There are five or six defendants. The petition avers that they executed and delivered a certain promissory note, which is termed an installment note; that it was given for a premium upon a policy of fire insurance; that the plaintiff insured the property of the defendants for a period of five years; that the first installment was paid in cash the first year, and that for the other installments the promissory note sued upon in this action was given payable in yearly installments. The petition sets out the various provisions of the charter which, it is said, was made a part of the contract by a reference to it in the policy of insurance. One of its provisions is, that in case any installment (as provided for in this promissory note) should not be paid within thirty days after it became due and after notice given by the insurance company that hereafter while the note or installment thus in default remained unpaid the insurance company should not be liable for any loss that might occur under the policy; but that upon payment of the amount thus in default, then it should be revived and be in full force, and the company should be liable for any loss occurring. The petition sets out in detail all of the provisions in reference to that matter.

The first defense of the answer is that the defendants did not execute this note as individuals, but as trustees of the First Methodist Episcopal Church of Mayfield, and that the policy was for the insurance of church property and they deny all the averments of the petition that differ from this statement thus made. They say that they signed and delivered the said note as trustees and not as individuals, and did not execute the said note in any other capacity than as such trustees.

For a second defense, they say that by the terms of the said policy, the same became null and void at the end of thirty days



from the first day of January, 1875, and has not been in force since, and that this note having been given in consideration of this policy, and the policy itself having lapsed, that the note for these installments is entirely without consideration; that the policy became null and void by its terms, and certainly did not continue in force longer than 30 days after they had received notice of the default; and they tendered two dollars, which they think is sufficient to meet their liability for the thirty days it continued in force after they had notice of its default.

For a third defense, they say that the agent of the plaintiff, at the time the policy was given, represented to them that all the policy or note meant was that it insured the property from year to year; and if at the end of the first year they did not wish to keep up the policy, they could simply refuse to pay and the policy would lapse; that it was optional with them to continue it in force or not after the first year.

To these three defenses a demurrer is interposed, upon the ground that they do not state facts sufficient to constitute a cause of action. The note itself not having been sent out, we are to gather from the averments of the petition and answer what it was. The petition sets out that these individuals, naming them, executed and delivered for a valuable consideration, a certain promissory note, whereby they promised to pay these sums; that they failed so to do, and are therefore liable for the amount of the note. The defendants say they signed and delivered this note as trustees of the church, and not as individuals. Whether the averment is intended to mean that they were simply acting as trustees when they did it, or whether they signed it as trustees is not quite clear. Now, we will suppose they averred that they were acting as trustees, and that they signed it as trustees, still we think it constitutes no defense.

There is no averment in the answer that there was any attempt to make it the note of the association. It is set out specifically in the answer that this church was not a corporate body, but was simply an association. We think the name of the real party in interest, as they claim the church to \*be, not being set out in the note itself, the words "as trustees" would be simply descriptive of the parties, and that the instrument must be construed as the individual note of the parties. We think the demurrer should be sustained as to that defense. 134

As to the second defense, it is contended that, by the terms of the policy itself, it became void because of the non-payment of this installment as it fell due. It is expressly set out in the petition that it simply became lapsed for the time being—as long as they failed to pay there should be no liability for loss on the part of the plaintiff, and while that default continued; but upon payment of the money, then for any loss that might occur thereafter, they should be liable, the policy being in full force.

The theory of the defense is, that the default taking place, the policy became absolutely void, and, therefore, that there was no consideration for the payment of the installments provided for in the note; but we think that is not sustained by the averments of the petition and answer, and that it is perfectly competent for these parties to contract that in case of failure to pay any installment of the premium, it should suspend the right of recovery for the loss happening while the failure to pay continued. We think, therefore, the second ground of defense constitutes no defense to this action; and as to the third ground of defense, it is averred that the agent expressed an opinion as to the liability created by the taking of the policy and the giving of the notes. There is no averment that he intended to make any misrepresentations, or that what he said was other than an honest expression of opinion. We think there is not enough in the answer, taken as a whole, to constitute a defense, and the demurrer is sustained.

Prentiss & Vorce for plaintiff; J. B. Fraser for defendant.

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### PLEADING—FIRE INSURANCE.

[Cuyahoga Common Pleas, May Term, 1878.]

†IGNACE MINERICK V. PEOPLES' MUTUAL FIRE INS. CO.

An action on a policy of insurance, in which the petition avers that the premises were destroyed by fire, etc., but which does not affirmatively show that the action was brought within the time stipulated in the policy of insurance, and there being no excuse alleged, the petition is defective, and demurrable.

HAMILTON, J.

This is an action on a fire insurance policy. The petition avers that premises were destroyed by fire and that plaintiff has sustained damage in the sum of the policy and has observed all the conditions of the policy. Demurrer on the ground of want of jurisdiction, which was overruled, and on the ground that the petition does not state facts sufficient to constitute a cause of action. The policy provides that no suit for the recovery of any claim shall be sustainable unless the same shall be commenced within twelve months next after the loss shall occur, and should a suit be so commenced after the lapse of said time, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, notwithstanding statute of limitations to the contrary, and it affirmatively appears that the action was not brought within twelve months, and no excuse being alleged, the petition is defective and the demurrer is sustained.

Peter Zucker for plaintiff; A. T. Brewer for defendant.

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†See 1 Cleveland, 217.

**\*EQUITABLE ASSIGNMENT.**

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[Cuyahoga Common Pleas, May Term, 1878.]

**THE NATIONAL CITY BANK V. GEORGE W. GARDNER ET AL.**

Where a creditor drew a draft for the whole amount of the indebtedness due him by the drawee, and assigned the draft to plaintiff, and the drawee afterwards in ignorance of a draft having been drawn on him, forwards a check to the creditor, who collects and deposits it to his own credit, and afterwards makes an assignment for benefit of creditors, such unaccepted draft is an equitable assignment of the fund, and plaintiff is entitled to the deposit in the bank, being the proceeds of the fund.

**HAMILTON, J.**

It is averred in the petition in this case that on or about the 8th day of November, 1877, for a valuable consideration paid to them, the Harvey Brothers, in this city, drew a draft upon Burbank & Co., located in the state of Pennsylvania; that at that time Burbank & Co. were indebted to Harvey Brothers to the amount of this draft, and that for this valuable consideration thus received they drew this draft for the entire amount of the \*indebted-  
ness of Burbank & Co. to Harvey Brothers; that on the 10th 140  
of November following, being some two days later, Burbank & Co., without notice of the existence of this draft, sent a check to Harvey Brothers in payment of their indebtedness; that that check was placed by Harvey Brothers, when they received it, in the Merchant's National Bank of this city; that it was simply placed there for the purpose of collection, and to be passed to the credit of the Harvey Brothers; that on the 15th of November following, they made an assignment to Samuel E. Williamson, in trust, for the benefit of their creditors; that he continued in the execution of his trust until about the 11th of January, 1878, following; that he then resigned his trust, and that Gardiner and Apt were appointed in his place as such trustees of Harvey Brothers for the benefit of creditors; that the fund still either remains in the Merchants National Bank on deposit to the credit of the Harvey Brothers or has been drawn out by these assignees, Gardner and Apt. Gardner and Apt and the Merchant's National Bank are, therefore, made defendants in this action; and it is claimed that by virtue of this transaction, they became the assignees of the funds in the hands of Burbank & Co., and, therefore, asked that whoever may have the funds be ordered to pay into court for its benefit the amount of this draft. A demurrer is interposed to this petition by the assignees of Harvey Brothers, upon the ground that the petition does not state facts sufficient to constitute a cause of action. It is said in support of the demurrer, that while it may be conceded that a draft upon a particular fund, the fund being designated, operates as an equitable assignment of the fund, yet, they deny that a draft drawn upon a general creditor without specifying the fund

operates as an assignment. It will be noticed that there has been no acceptance of this draft; that before the draft reached Burbank & Co., they had sent the check to Harvey Brothers in payment of the claim. So that it presents the question whether, under those circumstances, there was an equitable assignment of this fund so as to entitle this plaintiff to the fund against the general creditors of Harvey Brothers, represented by these assignees.

Now, we will suppose that this money had not been paid at all; that it was still in the hands of Burbank & Co., with notice to them of the existence of this draft, and with notice also of the fact that there had been an assignment to these assignees, and Burbank & Co., not knowing to whom to pay it, was here before this court, by way of a bill of interpleader, asking the court to determine to whom this fund belonged. It seems to me that the fact that it had been paid to Harvey Brothers, and by them deposited to their credit, and thus coming to the hands of the assignees, cannot alter the question. How, then, would the case stand if we were considering a bill of interpleader of this kind? It seems to the court that honesty and fair dealing should have required at the hands of Harvey Brothers upon the receipt of that check from Burbank & Co., to have immediately paid the amount upon its receipt to the plaintiff in this case, it having drawn for the full amount of the claim upon them, and that, as between the drawer of that draft, to wit, the Harvey Brothers and the payee, the plaintiff in this action, there would have been an equitable assignment of the claim; and it does not seem to the court that there is anything in the fact that there has been a subsequent assignment to assignees for the benefit of all the creditors, to take it out of this rule, and it would stand thus: That the plaintiff in the case had taken an assignment of the fund, if we were to regard it as an equitable assignment, and we think it is to be so regarded, because while the plaintiff when it took this draft had the individual liability of Harvey Brothers as well as this fund to go upon, yet we think it trusted and must have trusted to the individual liability of Harvey Brothers and to the faith and credit of this fund that was in the hands of Burbank & Co., while, on the other hand, these assignees simply stand in the shoes of the Harvey Brothers. We think that equity and good conscience required of the Harvey Brothers to pay over this fund, and no other rights having intervened, which we think should take precedence here, that equity requires that this be regarded as an equitable assignment, and that the proceeds of the check be paid over to these plaintiffs. I am perfectly aware that there is very much conflict in the authorities upon this question, but the conflict, it seems to me, arises mainly out of the question of the legal right to sue at law, rather than in equity, and that wherever the case can be brought to the conscience of a court of equity, then this rule of equitable assignment, in cases of this character, should prevail. The demurrer will be overruled.

Grannis & Griswold for plaintiff; Ranneys for defendants.

**ATTACHMENT—EXEMPTION.**

[Cuyahoga Common Pleas, May Term, 1878.]

**CHARLES WRIGHT, PLTF. IN ERROR, V. J. W. BALL, DEFT. IN ERROR.**

A man not living with his wife and children and not contributing to their support, but has another woman whom he claims to be his wife living in another state, who has children by another man, cannot hold his wages exempt from attachment as being necessary for the support of his family.

**HAMILTON, J.**

This action was brought originally before a justice of the peace. An attachment was issued against the defendant in the case, and certain wages of the defendant in the hands of the Cleveland Rolling Mill Company were garnisheed. A motion was made to discharge the attachment below, and was overruled and a judgment was rendered against the defendant. A motion is now made in this court to dismiss the petition, because they say there is no sufficient bill of exceptions—that there is no bill of exceptions. There is a bill of exceptions set out here, and it would appear from the transcript that the case was tried on the 26th day of April, and a judgment taken against him in the main action and also holding the attachment; that he took exceptions to the ruling of the court upon the motion, and that the 27th day of April, the day following was fixed for him to file and perfect his bill of exceptions. On the following day he appeared in court, but counsel could not agree upon the bill of exceptions, and the justice refused to sign it because it was not correct; that the case then went along until the first day of May following; and a bill of exceptions that was in accordance with the facts, as the justice thought, was then signed and perfected. It was made a part of the transcript and a part of the record in the case, and it is conceded to be here in full. It is said that under the provisions of the statute, when a day was fixed, to wit, the following day, the 27th day of April, that was the time and the only time in which a bill of exceptions could be taken, the language of the statute being, that when either party during the trial of the case before a justice of the peace, desires further time in which to perfect his bill of exceptions, the court shall fix the time at which the bill of exceptions shall be signed, and that time could not be beyond five days from the day of the trial. It is contended that this is a provision that is imperative, and that it cannot be fixed for a longer time; the justice having exercised his discretion allowing them time and fixing the time that no other time can be accepted as the time for perfecting the bill of exceptions. The case is also submitted upon its merits. The question as to whether the bill of exceptions was properly taken or not, I do not find it necessary to determine, \*because upon examination of the case, I am satisfied that the judgment should be affirmed. It

would seem that the defendant claims that the attachment should have been dissolved upon the ground that the funds were necessary for the support of his wife and children. It clearly appears from the evidence before the court that he was married some years ago and has a wife and five children now residing in Canada, but to whom he gives no support whatever, and has not for years, and that he has another woman whom he claims to be his wife, living in Pittsburg, who has two children by another man.

Now, I hardly think he comes within the provision of the statute exempting a man in his family relations, and the judgment below is affirmed.

Benjamin for plaintiff; Schindler for defendant.

### BILLS AND NOTES—PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

JACOB WISENOGLE V. LANSING E. POWERS ET AL.

1. In an action on a note and to foreclose a mortgage, showing that plaintiff became owner long before maturity, an answer setting up fraud and want of consideration without averring knowledge on the part of plaintiff thereof is demurrable.
2. Merely numbering the paragraphs of an answer is not good practice, and is not the proper way to separately state and number the defenses.

HAMILTON, J.

This is an action brought upon a promissory note, and to foreclose a mortgage secured thereby. The defendant, in his first ground of defense, sets up that the note was procured by fraud and was without consideration. But it appears from the petition that the note was transferred long before due; and there is no averment in the first defense of the answer of knowledge on the part of the plaintiff of the existence of this fraud, or of the want of consideration. A demurrer is interposed to the first defenses, and is well taken. The only difficulty that the court has found in the matter is that the answer sets up several defenses, and paragraphs are numbered as though they were separate defenses in the case. It says: "The defendant for answer to plaintiff's petition, says"—and opposite upon the margin is the figure 1. Then follows: "And defendant further says"—and on the margin opposite that is the figure 2. The difficulty is in seeing that these are separate defenses; yet, it would seem, by an inspection of the papers, that a motion was heretofore made to have the defendant separately state and number his defenses, which was sustained. In compliance, seemingly, with that order of the court, he filed this amended answer, I think he may then be regarded as treating this as his first defense. The plaintiff seems to have so treated it, and perhaps the court

ought to so treat it. Yet, the court does not desire to establish the precedent that the mere numbering of the paragraphs is a numbering of the defenses of an answer.

The demurrer to the first defense is sustained.

J. S. Grannis for plaintiff; Canfield for Powers.

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### APPEAL BONDS—PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

M. M. SAFFORD v. GEORGE W. MERRELL.

A petition on an appeal bond is not open to a motion to make the petition more definite and certain by attaching a copy of the bond, for the bond is no part of the petition; the motion should be to require a copy of the bond to be attached.

This was an action founded upon an appeal bond. A motion was made to make the petition more definite and certain by attaching a copy of the bond to the petition.

The motion, by the court, Hamilton, J., was overruled, on the ground, that under section 117 of the code, the bond is no part of the petition; and the motion properly should have been to require a copy of the bond to be attached to the petition.

P. P. for plaintiff; Hord, Dawley & H. for defendant.

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\* [Hamilton District Court, 1878.]

J. G. MURDOCK & CO. v. THE NATIONAL TUBE WORKS CO.

For opinion in this case see 3 B., 409.

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[Hamilton District Court, 1878.]

HARDING JOHNSON v. THE COLLEGE HILL NARROW GAUGE  
RAILROAD CO.

For opinion in this case see 3 B., 410.

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### ACCOUNT.

[Cuyahoga Common Pleas, May Term, 1878.]

J. H. BECK v. A. J. BALL.

A petition on an account giving a copy of the account but not averring what is due or what plaintiff claims, is not a compliance with section 122 of the code, (§ 5086 Rev. Stat.), and is demurrable.

HAMILTON, J.

The petition in this case contains two causes of action; and to the first cause of action, a demurrer is filed by the defend-

ant, upon the ground that it does not state facts sufficient to constitute a cause of action. The first clause is so brief that I will read it: "The plaintiff, J. H. Beck, says that his first cause of action against said defendant, A. J. Ball, is based on an account, of which the following is a copy, to wit:"—(Then follows the account.)—"All which sum is now due and unpaid, with interest thereon from May 2, 1878."

It is objected that there is in this no compliance with section 122, inasmuch as there is no statement that there is anything due from the defendant to the plaintiff, or anything which he claims; neither is there any promise to pay set out in terms, nor any averment that the property was delivered upon request; so that it is a case without a statement of a consideration, without a statement  
148 \*that the property was delivered on request of the defendant without any averment of a promise to pay.

We think, if the brief method of section 122 is to be adopted, there must be a substantial compliance with it. It is laid down by the authorities, clearly we think, that those brief statements and averments are, by force of the statute, made equivalent to an express declaration of a promise to pay and of consideration, or that the material was had at the request of the defendant, and delivered by the plaintiff at his request. All these averments are included in this brief method of pleading; and they are so included by force of the statute, and take the place of the express averments which were always necessary under the old form of pleading. We think there must, therefore, be a substantial compliance with the section, in order to make it have the effect which the statute says it may have.

The demurrer will be sustained.

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### PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

#### ANONYMOUS.

A petition by a son, a minor, against his father, who as his guardian, had made a pretended sale and got the property himself, is not open to a motion to compel plaintiff to state when he became of age, so that the applicability of the statute of limitations may be known, for such date pertains only to the defense and not to the plaintiff's case.

#### HAMILTON, J.

The petition in this case avers that, some eighteen years ago, when the plaintiff was a minor, the defendant, John D—, who was his father, was the guardian of his person and estate; that, at that time, the plaintiff was possessed of a certain piece of land, describing it; and that the defendant, as such guardian, upon an application to the probate court, procured an order of sale; that the premises were sold, and a confirmation had. The plaintiff says



that they were sold to one George —, a brother of the defendant and an uncle of this plaintiff for the sum of \$200.00; that there was no money actually passed between the parties at all; and that subsequently the defendant procured a conveyance to himself from his brother to whom the land was ostensibly sold, and some years afterwards sold it to another party for the sum of \$500.00. He, therefore, asks him to account for the proceeds of this sale, and asks a judgment for \$500.00 with interest.

A motion is made by the defendant, asking that the plaintiff be required to make his petition more definite and certain by setting out at what time he became of age, averring that it becomes important to the defendant to know, so as to know whether the statute of limitations will run against the plaintiff's claims.

We do not think this motion is well taken. We think the precise nature of the plaintiff's claim is entirely apparent upon the face of the petition. To set out more is not necessary in order to maintain the plaintiff's case at all; but it is simply necessary as they claim, to apprise them of some fact pertaining to their defense. We do not think this is a case that requires the petition to be made more definite and certain in that particular. Besides, it would seem to the court that the defendant, being the father of this plaintiff, would have as much knowledge upon the subject of the age of the child as the child himself.

The motion will be overruled.

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## BILLS AND NOTES.

[Cuyahoga Common Pleas, May Term, 1878.]

WM. V. TOUSLEY v. J. J. SCHWIND, R. A. DAVIDSON AND JOHN J. WIGHTMAN.

A petition on a promissory note against the maker and indorser, which contains no averment of protest, or that the indorser had notice of protest or of payment, is demurrable by the indorser.

This was an action on a promissory note made by J. J. Schwind and indorsed by the other defendants; and the plaintiff claimed there was due to him upon the note, from these parties in their respective capacities of maker and indorsers, a certain sum from a certain date, to which time the payment of the note had been extended. A demurrer was interposed by the defendants, Davidson and Wightman, on the ground that the petition did not state facts sufficient to constitute a cause of action.

The court, Hamilton, J., held that, inasmuch as the petition contained no averment that the note was ever protested, or that the indorser had notice of any protest or want of payment, the demurrer was well taken.

**PAROL LEASE.**

[Cuyahoga Common Pleas, May Term, 1878.]

**LESTER MILLER AND FRANCIS W. MILLER v. DAVID CASKEY AND  
S. LOENBURG.**

An action for rent on a parol lease "whereby defendants became possessed of the whole of said terms," and paid the first month's rent in advance, is not open to the objection to make more definite and certain, by stating whether defendants ever took possession under the lease.

HAMILTON, J.

This action was originally brought before a justice of the peace, and was appealed to this court. The averments of the petition are, that these plaintiffs were the owners of a certain block on Water street in this city at a certain date, and that, at that time they made a lease by parol of certain portions of the block to these defendants, which was to continue for one year, beginning on the day following the making of the lease "whereby the defendants became possessed thereof for the whole of said term;" that the defendants have paid the first month's installment of rent in advance, as stipulated by the terms of the lease; and they, therefore, ask judgment.

A motion is made by the defendants to make the petition more definite and certain, by stating whether the defendants ever took or held possession under the parol lease set forth in petition. The point is that the lease being by parol and relating to an interest in real estate, unless possession was taken under it, it is within the statute of frauds. We do not think there is any averment in this petition showing that any possession was ever taken under this lease; but we are of the opinion that none is necessary affirmatively in the petition. It was held in the 7th Ohio, under the old practice, that upon a petition where the statute of frauds affects the contract, it is not necessary in the declaration to set out the fact, so as to bring it within the exceptions of the statute of frauds; but that, where a plea is interposed as a defense, they may then set out all the facts in relation to it; that, if they did not, it would be liable to special demurrer. Under our practice motions take the place of these special demurrers; and certainly, if it was unnecessary under the old form of practice it is not necessary now. Therefore, in my judgment, where a contract is expressly set out, and a promise is made to pay it is not necessary to aver that possession was taken under the contract, so as to take it out of the statute of frauds. That is a matter of defense which can be set up by the party.

The motion will, therefore, be overruled.

## DIVORCE.

[Cuyahoga Common Pleas, May Term, 1878.]

† MOSES W. DUNBAR V. MARY DUNBAR.

1. It is not sufficient to constitute gross neglect that a wife, after getting all her husband's property, under a promise to make mutual wills, has become insolent and abusive and refuses to cohabit with him and has ordered him to leave the house and finally abandoned him.
2. An action for specific performance or equitable relief under a promise to make mutual wills, and an action for gross neglect of duty in getting and retaining all of the husband's property in reliance on such promise, and then attempting to drive him out, are not joinable in one action.

This is an action for divorce and equitable relief. The petition states that the plaintiff at the time of his marriage to the defendant was the owner of certain real estate and choses in action; also that the defendant was the owner of certain real estate in the city of Cleveland; that about ten years after the marriage the plaintiff and defendant agreed to make wills by the terms of which the husband was to devise all his property to the wife and the wife to devise all her property to the husband; that in pursuance of this agreement the husband, as he thereafter from time to time acquired property, caused the same to be deeded to the wife in trust; that thereafter the wife sold her real estate and deposited the proceeds in bank to her own account. The petition then proceeds to itemize the property and moneys which the husband from time to time gave to the wife amounting to a large sum; that after getting possession of this money and property, \*under said agreement, 149 "the said Mary Dunbar, wholly disregarding her marital duties toward your petitioner became insolent, arrogant and dissolute with his said money and property," and demanded that husband should take into the family and support a son who was "an habitual drunkard and notorious bummer;" that since a certain date the defendant "has determined to drive the plaintiff from his home and property;" that for that purpose she left his bed and refused to sleep or cohabit with him, ordered the plaintiff to leave the premises, removed his bed to an upper apartment of the house without giving him bed clothing sufficient to keep him comfortable, refused to wash or cook for him, or recognize his rights in the property, "instigated the said drunken bully to insult, assault and abuse" him for weeks when he visited his home for board and lodging; that his life was in danger on such occasions if the said son happened to be on a drunken spree; that the defendant finally abandoned plaintiff and declared she would never live with him again—"wherefore your petitioner says that the said Mary Dunbar has been guilty of *gross neglect of duty* toward your petitioner in the several particulars hereinbefore mentioned."

†Affirmed by the supreme court; no report; 8 B., 287.

The petition then proceeds to state, in substance, that the defendant, after getting possession of plaintiff's money and property, refused to make a will, and refused to give the plaintiff the care and control of any of his property; that said property was given to her in trust during the natural life of plaintiff, and that the possession and title thereto was procured from the plaintiff by the defendant by fraud; that the plaintiff is entirely destitute, without means on which to subsist and clothe himself; that he owns an unproductive interest in common in a certain piece of land, which is mortgaged, and that for the purpose of annoying plaintiff and subjecting his said interest to sale, the said defendant "has been running large bills at the store, and procuring the same to be charged to your petitioner.

The prayer of the petition asks that the marriage may be annulled, and that the said real estate, moneys, etc., held by the defendant may be declared to be held in trust and that the defendant may be ordered to reconvey the same to the petitioner for his reasonable support, and for such other relief as justice and equity may require.

To this petition the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action.

The court, Barber, J., held that the demurrer was well taken; the facts stated not constituting gross neglect of duty for which a divorce should be granted. As to the equitable relief sought the court decided that it could not be granted in this proceeding.

Jackson & Stewart for plaintiff; A. T. Brewer for defendant.

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### PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

MRS. V. E. AMBUSH v. WM. H. FORD ET AL.

A motion to strike out part of an answer, and part of the matter moved to be stricken out is good, the motion asks too much and will be overruled.

HAMILTON, J.

This action is brought into this court by appeal from the justice court, and was an action in replevin against W. H. Ford and his codefendant, who was a special constable. The pleadings in the case are somewhat anomalous, and, on the whole, something of a legal curiosity.

The petition states that the action was originally brought before a justice of the peace upon an affidavit made by this plaintiff, and sets out a copy of the affidavit and makes it a part of the petition, and then says that the defendants have wrongfully detained from the possession of the plaintiff the aforesaid goods and chattels, described in the affidavit.

The defendant answers by giving a detailed history of the transaction beginning a few days prior to the commencement of

the action before the justice. He says that there was an action brought before Justice Weed by Ford for these same goods, and that his codefendant was appointed a special constable by Justice Weed, and got possession of the goods; that while this special constable had the goods in his possession, before bond was given, that the plaintiff in this case went before Justice Bates and made an affidavit in replevin by which she got the goods away from the special constable; that the case before Justice Weed was subsequently transferred to Justice Babcock and tried by him, upon which trial the jury returned a verdict for the plaintiff Ford, and the goods having been taken from the plaintiff a judgment was recovered for the value of the goods—something over a hundred dollars.

The answer then adds "the defendants further say that the goods were gotten from the defendant's possession by a prostitution of the forms law upon a perjurious affidavit; that all the merits and the precise issue in this case presented, has, between substantially the same parties, been already tried before Esquire Babcock resulting in a judgment in favor of the defendant Ford; that the plaintiff is insolvent; that this replevin was unwarranted and unlawful; that the appraisement was irregular and corrupt; being for said goods in gross and for the totally inadequate sum of \$36.00; that the replevin bond was inadequate and totally worthless, the bail being 'A. Byam,' a person notoriously insolvent and execution proof; and these defendants have no adequate remedy by the prosecution of this cause to its ordinary termination; that the only proper remedy, and what defendants asks, is that the judgment by Squire Babcock rendered be herein reaffirmed or a judgment be rendered in favor of the defendant Ford for the amount there found due the said defendant Ford, and that in default of payment thereof that an order issue requiring the plaintiff to redeliver to the defendant said goods and chattels so wrongfully and criminally taken from his possession."

A motion is made to strike out the above from the answer because it is redundant and irrelevant. I am inclined to think a good deal if it is so, but the character of the petition is such, and the whole case is of so peculiar and novel a character that I am disposed to allow these parties to go to trial upon the facts as they can make them appear; but I am rather of the opinion that in a part of this portion of the answer asked to be stricken out there is an attempt, at least, to plead, *res adjudicata*, and the motion being to strike the whole of the matter out, we think it asks too much and is, therefore, overruled.

B. F. Reno and G. T. Smith for plaintiff; E. D. Stark for defendant.

**LAND CONTRACT.**

[Cuyahoga Common Pleas, May Term, 1878.]

**DANIEL McNICKLE v. G. G. HICKOX ET AL.**

A justice of the peace has no jurisdiction in an action in which it is sought to recover a payment due on a "land contract."

This action was originally brought before a justice of the peace to recover a payment due "upon a land contract," and a judgment was rendered in favor of the plaintiff. The defendant by a petition in error sought a reversal of that judgment on the ground that the justice did not have jurisdiction of the subject matter of the action; and the court, Cadwell, J., so held.

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**ASSIGNMENT.**

[Cuyahoga Common Pleas, May Term, 1878.]

**HENRY N. RAYMOND ET AL. v. G. H. FOSTER, ASSIGNEE.**

The false representations of A. to B. in order to obtain his accommodation indorsement to a note that C. whose name was forged, had signed, and that A. had transferred certain account to C. as security for the note, estops A. and consequently his assignee for creditors to deny the assignment to C. and the assignee must hold them in trust for the payment of such note.

**HAMILTON, J.**

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This action is brought by the plaintiff\* under the firm name of Raymond, Lowe & Co. against George H. Foster, as assignee of Watson & Co. The plaintiffs say that sometime in 1877, for the accommodation of Watson & Co., they indorsed a note which appeared to be signed by Watson & Co. and by L. B. Parker as makers, the note being drawn to them as payees; that they made the indorsement at the request of Watson & Co.; that the note was afterward discounted at one of the banks in this city for the benefit of Watson & Co. and the proceeds of the same went into the business of Watson & Co.; that it was subsequently renewed two or three times and was finally protested for non-payment, and the plaintiffs, as indorsers, were compelled to and did pay the amount of the note.

It is further said that when this note was thus indorsed and renewed by them it was represented to them by Watson & Co., that L. B. Parker, the other maker of the note was solvent, and they supposed him to be solvent, and they supposed that Watson & Co. was also solvent, indeed so represented to be; and it was further represented by Watson & Co., that they had transferred certain accounts to Parker to secure him for thus signing the note; that he was really a surety upon the note and those things had been as-

signed to him as security; and while they, Watson & Co., were yet doing business, and supposed to be solvent, they, upon their books, transferred sold and assigned to Parker certain accounts of Watson & Co. with the intent and for the purpose of paying this claim, and for the purpose of being so used in the discharge of this indebtedness represented by the note. They say that subsequently Watson & Co. became insolvent and made an assignment to Foster, the defendant in this case, and that he is now in possession of these accounts thus assigned. They say they have made a demand upon the defendant for these accounts and claims thus assigned for the purpose of securing this indebtedness, and that he has refused to deliver them; they, therefore, ask that he be declared a trustee, holding this assigned property in trust for their benefit, to the extent of this one thousand dollars, and that he be ordered to pay that amount to them in the discharge of this indebtedness and for other equitable relief.

To this there is a demurrer interposed by the defendant upon the ground that the petition does not state facts sufficient to constitute a cause of action, I ought to have said, it is also stated in the petition that L. B. Parker, who signed the note upon its face as maker, but really as surety, as represented to the plaintiff, in fact never signed the note at all; that it was a forgery on the part, perhaps, of Watson & Co. or of some member of the firm; and that Parker never having signed the note, the transfer of the property to him was a nullity, and, therefore, when the assignment was made to Foster, as assignee, for the benefit of all the general creditors, the property passed to him and the creditors are entitled to the proceeds of the funds represented by these accounts and claims thus assigned.

I suppose as a matter of law, that this assignee, by virtue of his assignment from Watson & Co., acquired just such title as Watson & Co. had to these claims and accounts; that he stands here in no other light than Watson & Co. would stand if they were here defending this claim.

I think it fully appears from the petition that this fund was transferred for that purpose, and that upon the faith of the representations made to these plaintiffs, they indorsed that paper. If Watson & Co. were here in place of the assignee, it would seem to the court there are such facts set out in the petition as would prevent them from denying that there was an equitable assignment of these claims. An assignment may be made without any special formality. It may be made by parol simply, that is, an equitable assignment may be; a legal transfer might not be affected, but in equity it would be, if made simply by parol as between the parties themselves, the rights of third parties not intervening.

I do not think it can be said that the general creditors through the assignee, stand in any better position than if the assignor were here. In a recent case decided by the supreme court commissioner, the doctrine is expressly laid down that an assignee gets just such

rights, just such title to property, as his assignor had; that he stands in the shoes of his assignor, with the same rights. The petition is not perhaps as full on some points as might be desirable, but taking it altogether, we think it substantially appears from the facts stated in the petition that the plaintiffs possess a greater equity than the general creditors, and the demurrer, therefore, must be overruled. It is quite possible that upon the coming in of the answer upon a statement of all the facts, there may not be any case made; but admitting all these things set out in the petition to be true, I am inclined to think the demurrer should be overruled and the facts made to appear by answer.

E. Sowers for plaintiff; G. H. Foster and James Lawrence for defendant.

### BILLS AND NOTES.

[Cuyahoga Common Pleas, May Term, 1878.]

#### LEWIS HENNINGER v. JOHN WAGER ET AL.

In an action by plaintiff for judgment on a note and for foreclosure of a mortgage, and plaintiff avers that the note was made to an administrator and assigned to plaintiff, the note and mortgage are open to all defenses, and an answer setting up usury is valid, for plaintiff does not hold by indorsement nor in due course of trade, he being only an equitable holder of the note.

\*HAMILTON, J.

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This is an action brought by the plaintiff upon a certain note and mortgage originally given by the defendant to E. Hessenmueller, as administrator, who as such administrator, it is averred, prior to the commencement of this action, duly assigned all his right, title and interest in the same to the plaintiff. It is also averred that the note is past due; that there is so much due upon it; that the mortgage has become absolute, its condition having been broken; and the plaintiff asks for sale of premises. The defendant, Wager, answers that, as to whether plaintiff has had any assignment of note and mortgage to himself, he is not advised, and, therefore, denies the same; denies that he is the *bona fide* holder and owner thereof; and sets up that there has been a large amount of usurious interest paid upon the note, the precise amount unable to say, certainly in excess of \$200.00 which he ought to be allowed; and he denies that the mortgage was left with the recorder for record, and that there is anything due on it.

157 \*A demurrer is interposed to this answer, for the reason that it does not state facts sufficient to constitute a defense.

We think that any defenses that may have existed against E. Hessenmueller, the payee of this note, as administrator, exist still against this plaintiff, he not being the legal owner and holder of the note; and the interest he may have being rather an equitable



one, not having received the note in the due course of trade and by way of indorsement. The defense of usury, therefore, may be made in this case as against this plaintiff.

We think, the answer as a whole is not demurrable. Some portions of it may be. Whether the mortgage was ever recorded is immaterial. The demurrer is overruled.

Stone & Hessenmueller for plaintiff; O. H. Bentley for defendant.

### PARTITION—MISNOMER—PARTIES.

[Cuyahoga Common Pleas, May Term, 1878.]

ELIZABETH E. LOWE v. MARTIN MAURER ET AL.

1. In an action for partition in which two petitions were filed by different parties on the same day, the latter should be stricken from the files, but not on motion, but rather by demurrer, as the statute makes the pendency of another action a ground for demurrer.
2. Where errors occur in a petition for partition by miscalling the names of some of the defendants, the petition ought not to be corrected by interlining an *alias* after each of the names.
3. In a partition proceeding it is not sufficient to make the guardian alone of a minor heir defendant; but the minor must be made a party.

HAMILTON, J.

The question in this case arises upon a motion to strike from the files a petition which was filed in partition and dismiss the case, for the reason that, prior to the filing of this petition asked to be stricken from the files, another petition had been filed, asking for a partition of the same land and between the same parties, the defendant in the petition asked to be stricken off being the plaintiff in the original proceeding. The fact seems to be that they were filed, perhaps, upon the same day. It is said that the petition last filed was filed with the knowledge that the other had been filed. That practice ought not to obtain. It ought to be stricken at once from the files.

It was suggested by the court, when this motion was submitted, that the proper method of reaching a case of that character would be by demurrer to the last petition, upon the ground that there was another action pending between the same parties—that being a cause of demurrer expressly provided for by the statute. But the attorneys upon both sides suggested that they wanted to waive the question of form and to get the opinion of the court as to what should be done in the premises, as costs were accumulating in both cases. It would seem, from an examination of the petitions in both cases, that the parties are not identical. In the original case, a party is omitted that is included in the last case. In the last case, a party is omitted that is included in the first. It is said that errors were made in the first petition; that they had mis-

called the names; that on filing the second petition the error was discovered and the original petition was amended by interlineation, by inserting "*alias*" after each of the names. We think that practice ought not to obtain here. Respectable people ought not to be "*aliased*" in proceedings in partition.

It seems that considerable feeling has obtained in this case from some cause or other. A portion of the heirs to this property of which partition is sought, live in England. One is a minor and has some guardians who were appointed under the English law. Those guardians are made defendants in the last petition without making the minor heir a defendant. The plaintiff in the first petition, who is the defendant making the motion in the last case, seems to hold his title, substantially, as it appears from the affidavits filed, by way of mortgage. He has a quitclaim deed of a certain interest from one of the original heirs of the property; and that quitclaim deed gives him the title to the property, which, in substance, makes him a mortgagee, though in part a trustee also; because it was not contemplated by the parties that it should ever go back to the heir, but that, upon a final sale of the entire property, by the administrator, or in partition, or otherwise, this grantee under the quitclaim deeds, the plaintiff in the first petition, is to get \$1,200.00 with interest; and that any surplus that may come to his hands he will pay to this heir. It is said that he, as such mortgagee, in fact, ought not to be allowed to maintain an action here in partition, not having a right of possession. This is a question we cannot determine on a motion. He avers in his petition that he is the owner of a fee, and, certainly, the last petition ought to make the minor, who owns the fee of a portion of this land or an interest in the land, a party.

The motion ought to be overruled. Whether a demurrer would lie to the petition, the parties not being identical in the case is another matter. Possibly a motion to consolidate ought to be made, though the parties are not identical in some respects as stated. Unless the attorneys can agree, the court will take some action in the premises, so as to prevent an unnecessary accumulation of costs.

E. W. Goddard for plaintiff; Chas. F. Morgan for defendants.

### CORPORATION—VENUE.

[Cuyahoga Common Pleas, May Term, 1878.]

#### MARGARET RUDE V. OHIO MUTUAL RELIEF ASSOCIATION.

1. A mutual protection association is not a life insurance company, and, therefore, cannot be sued in a county where a loss has occurred, other than in the county where its principal office is located.
2. Where a petition discloses facts enough to show that there is no jurisdiction of the person, then a demurrer may be interposed; but wherever it does not so disclose it, and the fact exists, then a plea to the jurisdiction must be taken by way of answer, and in no case can this question be disposed of by motion.

HAMILTON, J.

This is a case brought by the plaintiff here to recover against the defendant, declaring against it that it is a corporation duly incorporated under the laws of Ohio, the petition averring that it was incorporated under the supplemental act of 1872, which act is supplemental to the general incorporation act of 1852, and also an amendment to this supplemental act of 1872, passed in 1875, the marginal title of the act being "Associations for mutual protection authorized."

The objection taken to this case is by way of motion to dismiss the action on the ground that no service has been had upon the defendant, and on the ground that this court has no jurisdiction over this corporation. It appears that it is a corporation organized under this act for mutual protection or relief; that it has its principal place of business at Urbana, in this state, and that service was made upon the agent of the corporation located in this county. It is conceded that under the general incorporation act, and the provision for the service of corporations generally, there has been no service in this case that unless this is an insurance company there has been no legal service in this case; and if true, that there was no legal service, it would be a good foundation for a motion to set aside and vacate the service, but it would be no reason for dismissing the petition, because service might subsequently be made upon the parties. What is attempted is to raise the question of the jurisdiction of the court. In my judgment, that question cannot be raised by a motion. If the petition discloses facts enough to show that there is no jurisdiction of the person, then a demurrer may be interposed but wherever it does not so disclose it, and the fact exists, then a plea to the jurisdiction must be taken by way of answer; in no case can this question be disposed of upon a motion, because it involves an issue of fact. The motion, then, in this case must be overruled. But as counsel have argued this case upon the hypothesis that the real question might be reached in this case, I have examined it upon that ground; and suggest that if the petition shows all the facts, which I think it does, so that the question can be raised by demurrer, that a demurrer\* might hereafter be filed; and simply a formal sustainment of it or dismissal of it had 158 without having the case re-argued. If the petition does not disclose the facts necessary, then I presume it can be amended by arrangement of parties so as to dispose of the question upon demurrer. It is the desire to have the court, at this time, determine the question whether these sort of associations are subject to be sued in the different counties of the state, or whether they can only be sued in the place where their principal office is located, as provided in the act for bringing suits against incorporations generally. With the view of determining that question, I have examined it somewhat, and I have come to the conclusion that there is no jurisdiction of the person of this defendant in this county. It is conceded that under the law for making service against corporations, this defend-

ant can not be served here and no jurisdiction can be obtained of it, unless it can be regarded as an insurance company, and thus fall within the provisions of section 48 of the code of civil procedure for the service of insurance companies. That act provides especially that insurance companies may be sued in the county where their principal office is located, or in any county where the loss or a part thereof arises; and, therefore, if this is an insurance company, the loss having occurred in this county—the death having taken place here, suit may be brought here.

Now the question is, is this an insurance company? In the 26th Ohio State, it was decided by the supreme court, it being a proceeding in *quo warranto* against an institution organized under this law, located in Norwalk, that in no way were the general laws of the state in relation to life insurance applicable to these associations. The act of 1875, being an amendment to that of 1872, expressly provides as follows: "That all rights accrued and all associations formed under said original act, shall survive and be subject to and governed only by the provisions of said original act, as hereby amended; and in no manner subject to the laws of this state relating to life insurance companies." Now, this act by which these companies are authorized is entitled "Associations for mutual protection authorized," and the purpose is declared to be that it shall be for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such association. Its manner of doing business, the laws applicable to it, are different, the objects and purposes are different. Its benefits are confined solely to its members, and to the heirs or the family of the deceased. In an insurance company, generally, any man can insure for the benefit of another in whose life he has an interest. Not so with this. It is organized for the mutual benefit and protection of its members, and one of its features is that of life insurance; and it is limited in that. But can it be said that this is an insurance company? If it is an insurance company at all, it is a life insurance company. But the legislature have expressly decided that in no sense shall the laws in relation to life insurance companies be in any wise applicable to these associations. But it is said if it is not a life insurance company, and is exempt from the operation of laws relating to life insurance companies, it is not necessarily exempt from the laws in relation to insurance companies. It is averred in the petition, by way of amendment, that its business is *solely* that of life insurance; but it is expressly averred that it is organized under this act. The averment that it is engaged solely in life insurance business does not seem to me to determine whether or not it is an insurance company. That is to be determined, it seems to me, by the act under which it is incorporated. It would scarcely do to say that a railroad corporation, doing an insurance business, was, therefore, an insurance company. It seems to me that its character is to be determined from the powers it obtains under its act of in-

corporation; and, in my judgment, it is in no sense an insurance company. It is instituted for other purposes or other objects as well. Take these relief associations. Take the Odd Fellows, Masonic order—many others, where there are mutual benefits; there is also a feature of life insurance attached to them, yet it does not bring them within the laws applicable to life insurance companies, and there is an especial exemption in favor of these companies, so as to put the question at rest by the language of the act; and while they are not under the operation of the laws of life insurance companies it does not seem that they can be regarded as insurance companies, at all.

That being the view of the court, the motion must be overruled, because it is not a proper method of reaching the question of jurisdiction.

Kessles & Robinson and Grannis & Griswold for plaintiffs; Eichelbarger and Warnock and J. S. Ludom for defendant.

### PARTNER AND PARTNERSHIP.

[Cuyahoga Common Pleas, May Term, 1878.]

#### FRANK ROCKEFELLER V. CHARLES L. MOREHOUSE.

Where the partners, sued after dissolution, on a firm liability in tort, concur in appointing attorneys to defend, one partner cannot by notifying the others that he will not be responsible for such attorney's management, and by employing another attorney to defend himself alone, resist contribution on final accounting for his share of the expense.

\*This case stands upon a motion to confirm the report of a referee and upon exceptions of that report. It seems that Rockefeller, Fawcett and Morehouse, prior to the first of October, 1874, were in partnership in this city; that at that date the partnership was dissolved, and a corporation was formed composed of the members of the firm of Morehouse, Rockefeller & Co. This corporation was known as the The Morehouse Oil & Wax Company. It would seem that all the effects, that is, all the personalty and property, other than the credits, book accounts, etc., of the old firm were, at the time of its dissolution and the formation of the corporation, transferred by Morehouse, Rockefeller & Co. to the new corporation. During the existence of the co-partnership a liability was said to have been incurred by the partnership upon a contract that was made with a man by the name of Timmins. Suit was brought by Timmins against Morehouse, Rockefeller & Fawcett as partners, under their firm name, for a fraud which was said to have existed in that contract.

The case has become somewhat historical, having gone through several extended trials. Upon the bringing of this suit, Prentiss & Vorce were employed as attorneys for Morehouse, Rockefeller & Co. with the assent of all the partners. The case went through

one or two trials, and subsequently Mr. McSweeney was also employed. But prior to the entering upon the last trial of the case, and when the case was being called, the defendant Morehouse appeared and distinctly notified the attorneys in the case that they should not consider themselves as his attorneys any longer; that he would in no way be responsible for their services; that the state of feeling was such between him and Prentiss & Vorce that they could not and should not represent his interest any longer in the matter; that if they went forward in the trial it must be at the expense and upon the credit alone of Fawcett and Rockefeller; that he proposed to defend for himself individually; and appeared in court by his counsel, Mr. Coon, and asked to be permitted to file a separate answer. This was denied. But the court permitted him to come in and defend for himself through his counsel, and he did so. An action was pending at that time between these partners, for the settlement of their partnership accounts, the action being brought by Rockefeller & Fawcett against Morehouse, claiming that they had made certain advances in behalf of the partnership affairs, paid certain claims and liabilities in excess of their proportion, and asking for a judgment against Morehouse for the amount that should be ascertained that they had paid in excess of their interest in the firm. That case was referred to a referee. The defendant Morehouse, before the referee, took the position, that for expense incurred in the trial of that case, after he thus gave this notice, including the expense of a stenographer for taking down the testimony, he was in no way responsible; that this was substantially an action in tort, and that he had a right to defend separately, and that all actions in tort, while they might be joint in form, were in substance several, and he had the right to defend separately; that he had expressly taken away any implied authority which his co-partners had to bind him by the creation of any obligations in respect to the partnership matter, and that he was not liable in any form for any share or part in this expense of attorneys and stenographer. The referee found against this claim of Morehouse. It appeared in the testimony among other things, that the two partners, Rockefeller and Fawcett, at the time of the dissolution, were authorized to settle and adjust the partnership affairs; that Morehouse was to no longer have any connection with it. I think it is laid down by the authorities, uniformly and universally, that this does not extend the authority of the partners who thus have the settlement of the affairs of the concern, and it does not give them any additional power except that it works as an exclusion, perhaps, of the other member of the firm who thus assents. It is said too, as a principal of law, beyond any question, that upon the dissolution of a firm, no partner has any power to bind his co-partners by the creation of any new obligation or promise, whatever; that he even cannot indorse the paper of the partnership without some express authority from the other partners; that it must be the

indorsement of all; that no title can thus be transferred; that he can do no act other than settle up the partnership business. Now, this claim, I apprehend, of Timmins, while it was founded in fraud, as alleged, of the partnership, was, nevertheless, a partnership obligation or debt; that while you may regard the doctrine, perhaps, as established, that substantially all torts, though they may be joint in form, are several in their character, yet the nature of this obligation, so far as this firm was concerned, was to bind it *in solido*, as the books claim, as it might be the tort of one of them adopted by the firm, or the proceeds of the tort carried into the firm and the circumstances be such as to bind the firm. Now, should a judgment be found in that case against the firm? It would seem to the court that it should be substantially a judgment against the firm, to be paid by the partners in proportion to their respective shares in the partnership, unless there are some equities between the parties when they come to settle up the firm business between themselves, which would take it out of its character of a firm obligation. If that is so, then this firm should be represented; it was a firm obligation as well, perhaps, as a several obligation. The very nature of the transaction was such that it bound the firm. There is no question, it seems to the court, as to the necessity for a defense in that case. Here was a claim for \$50,000 against this firm for a transaction growing out of the firm business, a firm contract, which they had all signed, and the proceeds of which had gone into the firm. Now, while they would be represented there perhaps, individually, and had a right to stand there and be represented individually, it was due to the firm, too, that it be represented. Suppose, for instance, that a receiver had been appointed for that firm. With that case pending it seems to me, that he would have a duty to perform in respect to the defense of that case; and if a receiver should be appointed under such circumstances and make a defense, it would seem to me that the only rule by which you could govern the transaction, when you came to divide up the obligations among the co-partners, would be to charge them in proportion to their respective shares in the partnership, unless, as I said before, there were some equities between the partners themselves to take it out of the rule.

Now, in trying this case before the referee it was not claimed by Morehouse that he should be compensated or that he should put in a claim, in any way, for the expenses which he had incurred through his attorney. It is quite possible that his defense in that case, if it had been successful, would have proved to be a defense in the interest of the firm. If he had been successful and been taken out from the operation of that judgment, and a judgment had been rendered against the two remaining co-partners, it would cease to be a co-partnership debt; and it is quite possible that a valid claim under those circumstances, might have been made by Morehouse for the expenses incurred by him, as well, upon the

theory that no partner can be shut out from a just defense which he has a right to make in any case pertaining to the partnership; and that while he had gone in that case and made this defense, inuring to the benefit of the partnership, they should also be taken into the account—it is possible that the whole equity of the case would require that to be done. But he refused to make any claim of that character, says he was defending for himself. What is the referee to do in this case? As a matter of fact, all had concurred in the employment of these attorneys down to the time at which this express notice was given. At that time Morehouse saw fit to step out and say that he would no longer be liable. Now, these two men were authorized to do anything that was necessary and proper toward the settlement of that partnership. Suppose a partner steps out of a firm at its dissolution and says, "I will have nothing whatever to do with the settlement and adjustment of this partnership; I will bear no portion of its expenses whatever. When you get through settling it, give me my share, but the expenses you must not charge to me." What is to be done in a case of that kind? There is an absolute necessity of winding up the affairs of the concern, and it is not doubted in this case that there was such necessity to defend this action for the firm. These two members of the firm were specially authorized to do anything that was necessary to adjust or settle the claim. In pursuance of that they did do this thing. While I am perfectly aware that it is very much of a mooted question as to whether two members of a firm—a majority of a firm—can control and say that they will have a thing done this or that way, except as to the domestic affairs, perhaps, in the office in the immediate management of it as against the protest of the third member. Yet, taking into consideration the fact that they were specially authorized to do this, that this all inured to the benefit of the firm; that it must necessarily do so, whether the claim is ill or well founded, it was, nevertheless, a claim made against the partnership. I am perfectly aware that some authorities go so far as to say, that while the partnership exists one member of a firm, when he makes a contract, binds all the members of the firm even against the protest of the other member of the firm; that while the partnership exists there is an agency to be presumed, and that agency is coupled with an interest, and that it cannot be revoked so long as the partnership remains intact. Such is the language of a case reported in Duer, but the case went to the court of appeals. There they put it upon another ground; but I am of the opinion that the current of authorities is against that doctrine. But taking into consideration all the facts in this case; that these two members were a majority of the firm; that they had express authority to settle the affairs of the firm; that there was an absolute necessity for making this defense; and that it was a debt or obligation incurred as a matter of necessity in winding up the affairs of the partnership, it takes it out of the rule,



it seems to me, that a partner cannot incur any new obligations to bind his co-partner after the dissolution of the firm.

Holding these views of the matter, the report of the referee in this case must be confirmed. The exceptions will be overruled.

Prentiss & Vorce for Rockefeller and Fawcett.

John Coon for Morehouse.

### CHATTEL MORTGAGE.

[Cuyahoga Common Pleas, May Term, 1878.]

#### C. C. SOUTHERN V. JOHN M. WILCOX, SHERIFF.

Where S. makes an accommodation chattel mortgage to L. and L. to secure him makes to him a chattel mortgage with the affidavit in the ordinary form it was held, that this is proper if L. was to pay, or had paid the former mortgage, but was bad if L. was merely to raise money on the former for himself and was to pay it, for in such case S. is a mere surety.

\* PRENTISS, J., and Jury.

This was an action in replevin to recover possession of certain property, by virtue of a chattel mortgage executed by one L. M. Southern to the plaintiff. It appeared from the testimony on the trial that sometime prior to the execution of this chattel mortgage the plaintiff had executed and delivered to L. M. Southern three \*notes for the aggregate sum of \$4,000 secured by mortgage on property of plaintiff under an arrangement by which L. M. was to indorse and raise money for his own use, also to pay the same when they became due. In order to secure the plaintiff against the payment of these notes and mortgage (one note for \$1,333.33, and interest having been paid by L. M.) and also to secure a debt of \$500, money borrowed, the chattel mortgage in question was executed. The statement upon the chattel mortgage was in the ordinary form. It was claimed on behalf of the defendant that the above facts in law constituted the plaintiff a surety of L. M. Southern, and the statement upon the chattel mortgage not disclosing the actual transaction between the plaintiff and L. M. Southern that the chattel mortgage was void. Upon this point the court charged the jury as follows:

"If the plaintiff made the four thousand dollar note and mortgage for the benefit of L. M. Southern, and to enable him to raise money upon them for his use, with the understanding and agreement between them that L. M. Southern should pay them, and L. M. Southern did indorse, negotiate and raise money upon them, and if the plaintiff did loan to L. M. Southern five hundred dollars, and the thirty-five hundred dollar note and chattel mortgage were wholly based on these transactions, there being no other consideration for them, the plaintiff not having paid any of those notes, and no new arrangement or agreement having been made between him and L. M. Southern by which the plaintiff was to pay them and

not L. M. Southern, and their original relations to these notes remaining unchanged up to the time of giving the chattel mortgage, the statement upon the chattel mortgage would not be in conformity with the requirements of law and the plaintiff cannot, therefore, recover.

"If, however, the understanding and agreement between the plaintiff and L. M. Southern in respect to the four thousand dollar note and mortgage was, that the plaintiff was to pay them and not L. M. Southern, and the plaintiff had lent to L. M. Southern five hundred dollars, or if before the giving of the thirty-five hundred dollar note and mortgage the plaintiff had paid those notes or an amount of them with the \$500.00 lent equal to the amount of the \$3,500.00 notes, or if, before the chattel mortgage was made a new arrangement or agreement had been made between the plaintiff and L. M. Southern by which the plaintiff was to pay the four thousand dollar note and not L. M. Southern, the statement, upon the chattel mortgage would be in conformity with the requirements of the law, and the plaintiff is entitled to recover. Such is the law as I hold it to be applicable to this case and to the only question which is made in the case."

### COVENANTS OF TITLE.

[Cuyahoga Common Pleas, May Term, 1878.]

†CATHARINE STOW v. N. A. GILBERT.

Where the covenantee assumed the obligation on an outstanding mortgage, but there was an earlier mortgage under which the land was sold, and he sues on the warranty, it is no defense that the mortgage he assumed was so drawn as not to be enforceable until discharge of the prior mortgage, and that plaintiff had, nevertheless, paid it off, for he had a right to pay it off.

HAMILTON, J.

—The petition in this case avers a breach of warranty and of certain covenants of seizen and covenants against incumbrances; that at a certain date, the defendants sold and transferred by deed of general covenants to this plaintiff, a certain parcel of real estate in this city; that by the terms of this sale the plaintiff paid some \$800 to the defendants, as a down payment, and assumed an incumbrance of \$1,700 by way of a mortgage then subsisting upon the premises, given by these defendants while they were the owners of the property. It is further averred, that as a matter of fact, there were other incumbrances to a large amount upon it, to wit: A certain mortgage which covered this and other property. The plaintiff says that she has performed her part of the agreement, paid this \$1,700 in full, and therefore paid the entire purchase price which she had covenanted to pay, and ought to have a free and perfect title to this land, and, in fact, that this other mortgage,

†See 2 Cleveland Reporter, 321.

which subsisted upon the property, and was a lien upon it at the time of the purchase, has since been foreclosed by a suit brought in this court, and the premises ordered to be sold, an order issued to a master for the sale of them, a sale actually had and confirmed, and a deed executed and delivered to the purchaser, who is a stranger to these parties. The plaintiff says, therefore, that her title is wholly gone, and "thereby she has been evicted from these premises," lost her title; lost the consideration which she has given, and she asks to recover the purchase price of the lands with interest. A motion is made by the defendants to make the petition more definite and certain, by stating whether or not there has been an actual eviction of the plaintiff from these lands in question, for the reason, it is said, that this is an action, substantially, upon a covenant against incumbrances, and that while such an action may be maintained for nominal damages wherever there has been a breach of the covenant, yet actual damages cannot be recovered unless the party has paid or taken up the incumbrances, or unless, at least, there has been an actual eviction. The defendants, therefore, say it becomes important to them to know whether the claim here is really one for nominal damages, or actual damages; in short, whether if the state of facts exists or not which entitles them to recover actual damages, the petition should be made more definite in that respect. In the view which the court has taken of this matter, we are inclined to think that the motion must be overruled. It is expressly averred in the petition that there was a covenant of general warranty by which they agreed to warrant and defend the title to these premises; it is also averred there was a covenant of seizen, and there was a covenant against incumbrances. It is true that she negatives in terms, only, the covenant in respect to incumbrances. She says that it was not true that it was free from incumbrances, and then goes on and sets out the facts which I have already indicated, and that "thereby the plaintiff has been evicted." We do not think the words "thereby the plaintiff has been evicted," is any averment of the fact that there has been an actual eviction. It is simply a statement of a legal conclusion from the facts which she has stated; and while it is conceded to be the law that in respect to covenants of warranty, there must be, before suit can be brought for breach of covenant of warranty, an actual eviction or something that is equivalent thereto, the question will arise, whether there has been anything in this case, equivalent thereto. In discussing whether this is an action upon a covenant against incumbrances alone or not, suppose for a moment that they had not averred, in terms, any negation of incumbrances, but had set out these facts, it seems to the court that there would have been, then, in those facts, an averment in substance that the covenant of warranty and of incumbrances had both been broken, and that it was entirely unnecessary even to have stated in precise terms that the covenant against incumbrances had been broken, for they set out facts equivalent to it; and so in reference to the

173 \*warranty we think it is an averment that both covenants have been broken, if we can see that there is anything here equivalent to an eviction. Now, it is argued by counsel upon the theory that it is an action simply for the breach of the covenant against incumbrances, that no actual damages can be had, nothing but nominal damages, unless there has been payment of the incumbrance that was upon the land, or unless there has been a disturbance of the possession—an eviction—or an interference with the use and enjoyment of the land in some way. Such is the language of Judge McIlvaine in deciding a case in the twenty-third Ohio State. Now, treating this as an action upon a covenant against incumbrances, purely, has there been any disturbance of possession or of the use and enjoyment of this property by the facts which are set out? It would seem to the court that when a judgment and decree has been taken, and a court of competent jurisdiction has swept the title out from under these parties, *in toto*, so that as they aver definitely, and as the facts show, if we treat them as facts, that they have lost the title, is there no interference with the use and enjoyment of these premises, for they were simply there as tenants at the will of the purchaser? Can it be said it is no interference with their enjoyment of them? Would they be likely to go on and make permanent improvements or otherwise, as though they had the fee of the land? It seems to the court there is an interference with the enjoyment; besides that, it is the language of the books, and I think is undoubtedly good law, that when an incumbrance sweeps away the entire title, so that the title becomes indefeasable in somebody else, that it is unnecessary to go forward and repurchase that land in order to entitle the party to bring an action upon a covenant against incumbrances. In support of that theory I read from Rawle on Covenants, page 164: "When an incumbrance is such as entirely to defeat the estate conveyed, but its consequences have not been such as to cause an eviction within the scope of a covenant of warranty, the damages are measured by the consideration money and interest." It seems to me, then, according to the theory there laid down, that an action might be brought for a covenant against incumbrances where the title has been swept away on a breach of the covenant against incumbrances. "Where the incumbrance was changed into a title adverse and indefeasable, the plaintiff was entitled to recover the money he had paid for the land with interest; for in such case the estate conveyed is entirely defeated, and the purchaser can not remove the incumbrance, nor can he enter upon and enjoy the land; and it would be idle to require him to purchase it, in order that he might be entitled to his damages for the breach of the covenant against incumbrances." Take an incumbrance that is four times the amount that the property is worth (such a case can be conceived of in these times, when the incumbrance was put upon the property in 1872-3, in a time of inflated prices), can it be said that a man shall pay four times what the land is worth, where the title has been entirely swept away

from him, before he can have his remedy for a breach of the covenant to recover back what may be a fraction of the amount he may have been compelled to pay? It does not seem to us that that is law. The supreme court, by Okey, J., recently decided: "A, who was a married woman, sold real estate to B, but the acknowledgment of the deed was so defective that the title did not pass. B sold the land to C who conveyed it to D. A commenced suit for possession against D, who brought an action and obtained a decree correcting the defect, and afterward obtained judgment in the action to recover possession. Held: That this was equivalent to an eviction of D, and in an action brought by D against C, on this covenant of general warranty, she might recover moneys paid for copies of records," etc. So that in this case whether it be upon a covenant against incumbrances or upon a covenant of warranty, and I think it may be treated as both—upon either view of the subject, I am inclined to think the plaintiff may recover actual damages under that state of facts. The motion must be overruled.

Robinson & White for plaintiff; Gilbert & Johnson for defendant.

### BILLS OF EXCHANGE.

[Cuyahoga Common Pleas, May Term, 1878.]

#### THE LOUISVILLE BANKING CO. v. A. McDONALD.

An answer in an action on a bill of exchange not indorsed by the payee, denying that plaintiff is the owner of it, and averring that he did not receive it in due course of trade, is a good answer.

HAMILTON, J.

The action in this case is brought upon a bill of exchange of which the following is a copy: "Four months after date pay to the order of ourselves \$438.51, value received. Charge the same to the account of W. H. Walker & Co." There is no indorsement by W. H. Walker & Co. upon the paper. It is averred in the petition that there is so much due from the defendant to the plaintiff thereon. The answer denies, first, that the plaintiff is a corporation, second, that the plaintiff is the owner of the bill of exchange mentioned in the petition; that the plaintiff received it in the due course of trade, and alleges that it holds it fraudulently by collusion with the drawers thereof, and with full knowledge of its defects and infirmities; that the consideration therefor was the purchase of intoxicating liquors intended to be, and which were, sold in violation of law, and known so to be by said plaintiff, and that the same, therefore, is void.

To this second defense a demurrer is interposed. We do not think the question as to the consideration being liquors designed to be sold in violation of law arises. We think the denial that the plaintiff is the owner and holder of the bill of exchange, and the

allegation that it did not get it in the due course of trade is a sufficient defense. It seems that there was no actual transfer made, and it is not necessary to deny that there was any indorsement, because the legal title has not been transferred by indorsement.

### PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

AMOS HOGAN v. W. H. CAPENER.

The omission of the words plaintiff and defendant from the names of the parties in the caption of the petition, does not open the petition to a motion to strike it from the files.

In this case a motion was made to strike the petition from the files, on the ground that in the caption of the petition the word "plaintiff," and the word "defendant" were omitted. Motion overruled.

Brown & Beggs for plaintiff; Arnold Green for defendant.

### EXECUTORS.

[Cuyahoga Common Pleas, May Term, 1878.]

N. P. BOWLER, ADMR., v. E. F. ERHARD.

A petition to collect rent in an action brought by an administrator, who has by parol leased land of intestate, into the enjoyment of which the lessee enters, is not demurrable.

HAMILTON, J.

It is averred in the petition in this case, that the plaintiff was duly appointed administrator of the estate of his intestate, and, as such administrator, at a certain date, he made a parol contract with the defendant, by which he leased to him a certain house and lot; that the defendant entered into possession of the premises and enjoyed them since; that he has refused on demand to pay the rent. The action is brought for the first month's installment of rent. It was originally brought before a justice of the peace, and the case was appealed to this court. A demurrer is interposed to this petition upon the ground that it does not state facts sufficient to constitute a cause of action. It is said it shows upon its face that it is an attempt by the administrator to gather in rents and profits over which he has no control; that as matter of law, upon the death of the intestate, his real estate descends at once to his heirs, and that they at once become entitled to the rents and profits of the real estate; that the administrator is in no way entitled to them even where he may take proceedings to sell the lands; that pending the proceedings and until the sale is actually made, he is in no way

entitled to the rents and profits, that they go to the heirs. That is true as a general proposition of law. It is claimed that the administrator had no power to make such a contract as administrator; that if he has made such a contract he must have made it in his individual capacity as agent or otherwise; that the rents and profits cannot be turned over even by the heirs, to the administrator, because by no arrangement between the parties will that be assets which the law does not make assets; that the bondsmen of the administrator would in no way be liable, even under an arrangement between the heirs and administrator. Suppose that in this case; the defense was interposed by the defendant, that he had been disturbed in the quiet possession of the premises, and that he asked to set up a counter-claim. It is said that such a counter-claim could not for a moment be entertained because the administrator could not be charged, as such, with any breach of covenant of this character; that the estate could not be bound by any such breach of covenant by the administrator, and that this action cannot be maintained by the administrator because he is not the real party in interest; that he has no interest whatever in the property, and, therefore, there is no mutuality of contract.

Those are the propositions that may be urged in favor of this demurrer. On the other side it may be urged with much force, that the defendant having gone into the possession of these premises by virtue of this contract, he cannot be heard to dispute the title of his landlord. It may be further urged that there are cases in which an administrator may have the control of a house and lot by virtue of his relationship as administrator to the estate; for instance, this petition does not contain the averment that this property belonged in fact to the intestate, and he does not, therefore, get possession of it in that way, but simply says as administrator he rented this property. We will suppose that the intestate had a chattel interest in real estate, that is, was possessed of a term of years; that term of years would apparently descend to the administrator, it would be chattels, and as such would come within the control of the administrator, and he might properly rent it and exercise control over it. Again under the statute in relation to the transfer of estates fraudulently by an intestate, the administrator is required to proceed and recover it back for the benefit of the creditors, in an action of ejectment; and in an action of ejectment to recover possession, he may declare the seizen as being in himself, so that, in that instance, the statute authorizes him expressly to take possession of the land. It is possible there may be other instances in which an administrator is entitled to the possession of the land. The question then arises, the general rule being that the land descends to the heirs, in these exceptional cases must the administrator set out the exceptional case in order to bring himself within the rule to make his petition good, or is it sufficient for him to aver generally that he did so and so—exercised this control, and that he is entitled to recover, and if there is any objections to be

taken to that must they be set up by way of defense? We are inclined to think that under the liberal construction that is to be given to the code pleadings, that the objections in this case cannot be taken by demurrer, but must be done by answer. In this case an express promise is made, possession taken of the property; and there is no good reason, in conscience, at least, why the defendant should not pay, as long as he is not disturbed in his possession. If he has any defense to the action, it seems to me he may set it up by way of answer. The demurrer will be overruled.

Mix, Noble & White for plaintiff; Willson & Sykora for defendant.

### HUSBAND AND WIFE.

[Cuyahoga Common Pleas, May Term, 1878.]

LOUIS BROOKER, EXR., V. SALOMA GROSSMAN ET AL.

1. Where a married woman contracts to buy real estate and is in possession, but has ceased to make the agreed payments, equity will give a remedy to the vendor's executor.
2. Where two causes of action are pleaded in one count, such objection can not be taken advantage of by demurrer to each, or a general demurrer must be overruled, if anything in the count constitutes a cause of action.

177 \*HAMILTON, J.

This is an action brought by the plaintiff as executor of his father's estate, against Saloma Grossman and her husband, together with the widow and heirs of his father; and he sets out that Saloma Grossman was the wife of her co-defendant at the time of the execution of certain contracts and for a long time prior thereto. These contracts were appended to the petition by way of exhibits. The plaintiff says that prior to the execution of these contracts, she was the owner of a certain piece of real estate, to wit: in 1870, she was the owner in fee and in her own right of a certain piece of real estate, and that she has continued to own that ever since. That subsequent to that time, to wit, October, 1873, she entered into four contracts, by which she agreed to purchase certain lots of the plaintiff's testator, then in full life. It seems that at the same time she bought these four lots and took separate contracts for each, she was to pay \$630 for each lot, paying, perhaps, \$100 down, and to pay the balance in five equal annual payments. The plaintiff says she has paid in the neighborhood of two or three hundred dollars upon each lot. But she has since then failed to pay. All the installments are due, perhaps, except the last; and he asks that a vendor's lien be enforced against her by the sale of these premises, or that the contract be declared forfeited, or if that cannot be done, that he as executor be permitted to sell this property for the payment of debts; and he further asks that for any balance that may remain after the sale of these lots, that the lot of



land which he says this defendant, Saloma Grossman, owned in 1870, and upon the strength and credit of which ownership he avers these contracts were made between her and his father, the understanding being, that this land which she then held was to be charged with the debt which she was thus creating. He therefore, asks for a sale of these lots, and that any balance there may be remaining, be made a charge upon this realty which she owns in fee and in her own right. To this petition there is a general demurrer. The demurrer is in substance, first, because the first, second, third and fourth cause of action on the contracts therein set forth do not, either or all of them, state facts sufficient to constitute a cause of action against the defendant; second, because the remaining causes of action therein set forth do not, or either of them, state facts sufficient to constitute cause of action against the defendant; and third, because the several causes of action therein are incorporated generally in the same cause of action. The petition sets out four causes of action by number, and in each one of them, there is, perhaps, two causes of action stated, to wit: For that she owned this land in fee at the time of \*the making of these contracts, or 178 the sub-lots, and that she expressly stipulated to charge this land which she owned in fee by virtue of these contracts. Now, it seems to the court, where two causes of action are set out in one count, that there should be a motion to separately state and number those causes of action, or, as Judge Swan lays down the practice to be, where there are two causes of action set out in one count, it is competent and good practice to move to strike out after the first cause of action from such count, because one cause of action would be recognized and the other must be redundant and irrelevant, so far as that cause of action is concerned.

The method of practice adopted in this case, it seems, is to demur to one cause of action thus set out in the count, and because that does not state facts sufficient to constitute a cause of action, then demur to the other cause of action set out in the same count. We think that practice ought not to obtain. We think this demurrer must be regarded as a demurrer upon the ground that the petition does not state facts sufficient to constitute a cause of action, and if there is anything in either of these causes of action to constitute a cause of action, the demurrer must be overruled.

It is said that there is nothing in these causes of action anywhere making a good and valid cause of action against this defendant, Saloma Grossman, and her husband, because she was a married woman when she made these contracts, and her contracts are absolutely void at law. It is further said that while the fee of the land remains in the vendor and before payment by the vendee, that the vendor is the owner of the legal title, and also of the equitable title, and there can, therefore, be no vendor's lien to be enforced, because none exists. It is said the remedy is upon contract, and should be for a specific performance in equity, or by a suit at law, making her liable under the contract. It is conceded a suit at law

will not lie in this kind of a case against a married woman; and it is said that, clearly, a suit for specific performance will not lie against a married woman, so that, there being no cause of action at law on the contract, and no action can be brought for specific performance, and there being no vendor's lien, there is no remedy against this woman, notwithstanding she has gone into possession of the premises—no remedy that a court of equity can take cognizance of; that there may be conditions of forfeiture; that the plaintiff may forfeit her rights, but that he need not go into a court to do it.

We do not agree with either of these views. In the first place, these exhibits, that are attached to this petition, are no part of the petition at all, being attached under section 117 of the code; and this clause of forfeiture does not appear in the petition at all, and is no part of it. It seems to the court, without going into a detailed examination of the various points made (and they have been very fully argued, a large number of authorities cited upon both sides) that where a married woman makes a contract for a piece of land, paying in part for it, and going into and remaining in possession of the land, that there should be some remedy in a court of justice, somewhere, for the vendor; that he has a right to come into court and either have the contract forfeited, set aside and cancelled, or to have the land subjected to the payment of the debt, if she chooses to maintain her rights to the land. He is entitled to some form of remedy. What that remedy is, under this petition, it is, perhaps, unnecessary to determine, for the purpose of deciding the demurrer.

It is said there are causes of action improperly joined, and that this executor cannot undertake in this form to have land sold for the payment of debts. That is the question in which these defendants, Saloma Grossman and her husband, certainly have no interest. We think that objection would be well taken if there was any cause of action set out here, but the only cause of action, so far as that is concerned, appears in the prayer of the petition. It is well understood that a demurrer does not lie to the prayer of a petition. There is no cause of action set out here that would warrant or justify any such thing being done by this court. There is no averment that there are any debts and there is no compliance with the statutory provisions in that respect. We do not think, therefore, there is any improper joinder. The question whether a married woman's estate under this form of pleading may be made liable or not, we do not undertake to decide. The demurrer will be overruled.

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**PLEADING.**

[Cuyahoga Common Pleas, May Term, 1878.]

JAMES LAWRENCE V. PETER COOLEY ET. AL.

A denial of all the averments of the petition in manner and form as therein stated will be stricken off on motion, but a demurrer is not a proper method of raising its sufficiency.

In this case an answer was filed denying all and singular the averments contained in the petition in the manner and form as the same are therein set forth and stated. The court, Hamilton, J., held that a denial in that form was not good, and would be stricken off on motion; that a demurrer was not a proper method of raising the question of its sufficiency.

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**COMMON CARRIER—PLEADING.**

[Cuyahoga Common Pleas, May Term, 1878.]

HENRY M. BALDWIN V. L. S. & M. S. RY. CO.

An action against a carrier for not safely delivering cattle within a reasonable time, but continuing in possession wrongfully and putting them in a pen with diseased cattle, where they died, is on a single cause of action, and a motion to separately state and number will be overruled.

HAMILTON, J. (Abstract of decision.)

This action is brought on a contract of carriage by which the defendant agreed to transport for the plaintiff a certain number of cattle from some point in Indiana to the stock yards in the city of Cleveland, and there safely deliver them within a reasonable time. It is alleged that the defendant did not so deliver them, but on the contrary continued in the possession of the cattle wrongfully, and put them into a stock yard that was infected with a disease known as the Texas fever, whereby they became infected, and that four of them died, wherefore he asks judgment.

A motion is made to separately state and number causes of action. Motion overruled.

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**GUARDIAN AND WARD.**

[Cuyahoga Common Pleas, May Term, 1878.]

†HARRY TAYLOR, BY HIS NEXT FRIEND, V. THOMAS GRAVES ET AL.

In an action attacking the judgment rendered in a replevin action, a defense that the judgment is void because defendant was a minor and no guardian *ad litem* was appointed, is demurrable, for such defense attacks the judgment collaterally.

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†See 1 Cleveland Reporter, 31.

HAMILTON, J. (Abstract of decision.) This action is brought upon a replevin bond, the plaintiff and another being sureties upon the bond. An answer is interposed by the defendant Graves, and to the second defense in the answer a demurrer is filed.

That defense is that the judgment in the case in which the bond was given was void, for the reason that at the time it was rendered the defendant, Taylor, was a minor and no guardian *ad litem* was appointed for him. We think the demurrer well taken. We cannot go back and try collaterally the legality of a judgment before a court of competent jurisdiction, because a guardian *ad litem* or some other things in the proceedings were not done as required by law. It would be attacking a judgment collaterally and cannot be done. The demurrer will be overruled.

### PLEADING—PRACTICE.

[Cuyahoga Common Pleas, May Term, 1878.]

M. WYMAN, ADMR., v. J. HAYES.

1. Filing a demurrer and at the same time a motion to strike off an amendment for a non-compliance with a former order of court, cannot be permitted, the demurrer raises an issue of law, and hence would waive the motion.
2. A dismissal for want of prosecution will be opened where plaintiff had previously died and his administrator did not know of the action and the attorney supposed the administrator would take charge of it.

HAMILTON, J.

179 This is a proceeding to vacate a dismissal \*of a petition and judgment for costs. It is averred that the plaintiff in the original action died while it was pending; and that thereafter the case was called and dismissed for want of prosecution. The administrator says that he did not know that such a case was pending when it was dismissed; and the attorney of the original plaintiff said he supposed the administrator would attend to it, or at least, perhaps that his authority to act as attorney had ceased with the death. The administrator says there is a good cause of action, and, therefore, asks that the judgment be vacated and he be let in to prosecute his action.

To this a demurrer has been filed upon the ground that it does not state facts sufficient to constitute a cause of action. Upon the same day a motion was filed to strike off an amendment to the original petition because of noncompliance with the former order of the court. It seems that a demurrer had heretofore been sustained to this petition and leave had been taken to amend it. Instead of filing an amended petition he had filed an amendment to the petition, without payment of costs. The practice of filing a motion and at the same time a demurrer cannot be permitted. The demurrer is substantially an answer raising an issue of law, and we think that would waive the motion. The motion must, therefore, be

stricken off, and we see no reason why the demurrer should not be overruled. But I think the court of its own motion should order that its former order be complied with, and that this amendment be made upon payment of costs. It is true that a memorandum in pencil is made here by the clerk, authorizing this to be filed, but the costs have not been paid. The clerk informs the court that that was done under a misapprehension of facts and statements made to him by counsel. We think that the party defendant has an interest in having these costs paid, and the order of the court complied with, which must be done or the petition will be stricken from the files.

### TAXATION.

[Cuyahoga Common Pleas, May Term, 1878.]

†CLEVELAND LIBRARY ASSN. V. FREDERICK W. PELTON, TREASURER, ET. AL.

1. A public library association for the diffusion of knowledge by books, etc., open to all persons on equal terms, is an institution of a purely public charity, and exempt from taxation.
2. Rooms in the building of a library association that are rented out, the rent being applied to the repairs and to the objects of the association, are not in any sense used for profit, and are also exempt from taxation.

\*HAMILTON, J.

This is a proceeding brought by the Cleveland Library Association setting forth that it is duly incorporated as such, for the purpose of the advancement of the arts and sciences, and the diffusion of useful knowledge among the public; that at a certain date, while they were thus organized, certain premises which are described in the petition, were donated by the liberality of one of the citizens of this city, to that institution, in furtherance solely of the objects of the institution; that county, municipal and state taxes have been imposed upon it, and that the treasurer of the county is about to enforce the collection of a portion of those taxes which they describe, and that something further is about to be imposed thereon by being placed on the tax duplicate by the county auditor.

It is said that this is an institution purely scientific and literary and for the advancement of useful knowledge among the public; that it is a public institution of learning, and as such is exempt from taxation. And it is asked that these taxes be enjoined upon the whole block and upon all its property thus used, being used, it is said in no sense for profit. That all the available rents of the property, are immediately placed to the credit of the library fund and used in sustaining the library, in increasing its capacity for the diffusion of useful knowledge; that a portion of these premises

†Reversed with report, 36 O. S., 253.

is actually used and occupied by the association for this purpose; that a portion of the premises is under rent, but that all this rent is converted to the use of the association for the purpose aforesaid; that no one receives any profit or benefit from these rents. It is, therefore, sought to have the whole property exempt, and a preliminary injunction is asked for, and upon a final hearing the same may be made perpetual, restraining the collection of these taxes and taking the property from the tax duplicate.

Some two or three terms ago this case was presented to the consideration of this branch of the court for an injunction which was refused. A demurrer is now filed upon the ground that the petition does not state a cause of action. It is said on the part of the plaintiff in this case, that this is a public institution, an institution for the diffusion of learning, and that, as such, comes within the provisions of the law exempting that class of property. (S. & S., 761.)

It is said that this institution should receive the care of the legislature, and that all laws tending to the benefit of such institutions should be liberally construed, for the reason that they are institutions purely for the public benefit, fostering useful knowledge \*among the people—that they should receive all the  
186 protection which the law will permit at the hands of a court of justice.

It is said upon the other hand as these exemptions from taxation are in derogation of the general law that all property should be equally taxed, that the rule should be all statutes exempting any class of property should be strictly construed.

The first question, perhaps, which arises in the consideration of this demurrer, is whether this is a public institution of learning, and if so, whether it is a public charity instituted for purely charitable purposes. We think that both these propositions must be sustained in order to bring it within the purview of the statute. The supreme court in determining what are public institutions have decided that an institution may be public without regard to its being free; but in considering whether it is charitable or not, it is proper to examine whether it is free, whether or not anything is charged by way of an admission fee for the uses and advantages of the institution. An institution which is open for the use of the public generally, upon the same terms, whether for pay or not, is public in its character. The supreme court so decided, especially in the 25th Ohio St., and also again in the 29th Ohio St.

The question then arises whether it is a charity. We think it must also affirmatively appear that it is an institution of a purely public charity, because while colleges and institutions of learning are especially mentioned in the act of the legislature by which these exemptions are created, the constitutional provisions nowhere speaks of these; but if they are to come under the constitutional provision, permitting these exemptions to be granted, they must come in under the classification known as institutions of purely

public charity, the language of the constitution being: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real estate and personal property, according to its true value in money; bury grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose \* \* \* may, by general laws, be exempted from taxation." So that there is no classification of property named in this constitutional provision that this can possibly come under unless it be "institutions of purely public charity." Now, as to what is the meaning of a charity the supreme court say: "The meaning of the word 'charity,' in its legal sense, is different from the signification which it originally bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. Lord Camden describes a charity as a 'gift to a general public use, which extends to the rich as well as the poor.' The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: For schools of learning, free schools, and scholars of universities, to establish new scholarships in a college; to found and endow a college; and in the case of the American Academy v. Harvard College, it was said to be well established, 'that a gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor, is a charity.' "

We think, then, under this definition this institution is a charity—a charitable institution. We think under the definition already given, that it is also public charity. Is it a *purely* public charity? The supreme court upon that subject say: "When private property is appropriated to the support of education, for the benefit of the public without any view to profit, it constitutes a charity which is purely public. When the charity is public, the exclusion of all private gain or profit is equivalent, in effect, to the force of purely, as applied to public charity in the constitution."

I am, therefore, disposed to think that this is an institution that is public; that it is charitable, a purely public charity, viewing it, therefore, within the definition of that class of property that may be exempted from taxation under section two, article twelve of the constitution.

The remaining question then is, having thus arrived at the conclusion that it is an institution of that character, whether it is used in any sense for profit. The statutory provision upon that subject is, in reference to the same class of property, that if it is rented or otherwise used and profit obtained therefrom, that it is then not to be exempted; and the 6th section of the act relates to purely public charities—includes all public charities; and the language of that is substantially that all buildings connected therewith

and all which are actually occupied by such institutions shall be exempt.

Now, in the 3d section of this act of 1864, it provides that all lands connected with public institutions of learning not used for profit shall be exempt. Public institutions of learning, we have already seen, are to be exempt, not because they are public institutions of learning as such, but because they are purely public charities. We, therefore, think they must fall within the restrictions of paragraph 6th, section 3d of the act of 1864, and that the reference of the legislature to public institutions of learning, is to be regarded rather as an expression of the legislative intent that these shall be regarded as public charities; but the rule governing public charities is we think however, prescribed in the 6th paragraph of this section 3.

It is not contended, the petition showing on its face otherwise, that all this property is actually used and occupied by this institution. It is said that a portion of it is so used and occupied and other portions of it are rented. Is it rented for profit?

The supreme court have passed upon a proposition similar to this under another act in this 19th Ohio, in the case of the Cincinnati College v. The State. It will be noticed that this statute which was construed by the supreme court in that case, was passed prior to the adoption of the present constitution, that under the old constitution, no constitutional inhibition was made preventing the legislature from exempting any class of property which it saw fit to exempt. So that the construction of the act was without reference to any constitutional provision as it must be since the adoption of the new constitution and the passage of the present act. That was an action brought to exempt the Cincinnati College which had been built with stores underneath, which were rented, a portion of the third story being occupied for college purposes. The question was whether that property was subject to taxation under that act which provided that all buildings belonging to scientific, literary, or benevolent societies, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all books, papers, furniture and apparatus and instruments belonging to said societies, used solely for literary, scientific or benevolent purposes, should be exempt.

187 It will be observed under this \*statute, the buildings must be used exclusively for these purposes, or they do not come within its provisions. In the present act, this word "exclusively" is entirely omitted, but there is a further provision that all public charities, all buildings connected with public charities and lands actually occupied by them shall be exempt.

Now, we incline to the opinion that some portion of this property should be stricken from the tax duplicate—that portion which is actually occupied by the association for the purposes for which it was designed. Whenever that can be ascertained, it should be taken from the tax duplicate.



When the former application was made to this court for an injunction, it was an application to restrain the entire tax, there being no indication what portion was occupied by the association for the purposes claimed it was refused because we could not restrain the entire tax as asked for in that petition. But we think that constitutes no objection upon a final hearing of this case, and upon the evidence being submitted as to how much of this property is actually occupied by the association for its purposes—when that is shown by a final decree, relief can be given to the extent that it actually falls within the provisions of the statute. If we are right about that, this demurrer should be overruled, because notwithstanding the petition asks for too much, yet upon a final hearing, if there is any portion which should be restrained, the demurrer to the petition as a whole, must be overruled.

Mr. Griswold: I don't understand the court to pass upon the question as to being used with a view to profit?

The Court: We will do so, perhaps, a little further than we have. The supreme court in passing upon that subject in the case of the Cincinnati College say, "This property is most of it leased and used with a view to profit. We suppose the plain and palpable meaning of this statute is, that the house and property, which these different institutions need to use whilst engaged in pursuit of their respective objects, shall be exempt from taxation. Such property when thus used does not produce an increase. It is used for purposes other than making money; and as the objects for which it is used are beneficial to the community, it is exempted from the burdens imposed upon other property. But when any society, no matter of what kind, whether scientific, literary or religious, enters the common business of life and uses property for the purpose of accumulating money, the government should, and we think the statute does, treat it in the same way persons are dealt with, who are using property in a similar manner, and engaged in the same business. Government cannot discriminate between the uses which different societies or individuals will make of the proceeds of their business and determine that this society or individual will make a more worthy disposition of the proceeds of his business than that, and, therefore, the one shall be taxed and the other not."

Another provision in relation to money: "Whilst the money is in the fund of the institution, to be used solely to meet its expenditures, it is making nothing; it is withdrawn from the common business of life to be used solely to effect the object of such institution. But should the trustees of the society use such money in business, either investing it in property or loaning it at interest, the property thus purchased or the money thus loaned would be liable to taxation as much as any other property or money at interest, no matter in whose hands it might be. As we have before intimated the law applies to the property as it finds it in use, and not to what may be done with its accumulation in future."

Now, we see no reason why that construction should not ap-

ply to the present statute, as the language in the two statutes are identical—"shall not be used with a view to profit." It was said that these stores that were thus rented under the Cincinnati College were used with a view to profit.

By Mr. Griswold: They accumulated the fund—they did not use the fund?

The court: The proceeds from the rents were used to pay interest on money loaned, so far as not wanted for college purposes, to pay the principal of the loan and after that it was to become a permanent fund for the benefit of the institution. But we are now getting at whether the property thus rented can be said to be used with a view to profit. They expressly decided, in my opinion, in this case in the 19th Ohio, that it was used with a view to profit when thus rented; that money loaned out at interest is subject to taxation; but money remaining in the coffers of the institution to be used for its ordinary running expenses, earning nothing, is exempt; however, the moment it is used for any other purposes—put out at interest, so that if you please, the interest can be used and become beneficial in that way, they say it is used with a view to profit. And that decision was made under a section of the statute which expressly stipulates in relation to the income arising therefrom, which is stronger than our statute today, which says nothing about any income.

I am inclined to think whenever it is not used absolutely by the association, but rented, that it is not exempt. However, it is unnecessary to decide that branch of the case, the court having come to the conclusion that it falls within this clause of public charities, and that the portion of the property thus actually used and occupied by it, should be exempt. It is sufficient to say the demurrer being to the whole petition must be overruled.

Judge Griswold: How as to the land which the building occupies?

The Court: We think the land should go with it—whatever portion, the exempted part of the building occupies should be considered as exempt in drawing the decree.

Grannis & Griswold for plaintiff; Heisley and Weh for the defendants.

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### PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

JAMES FRENCH v. J. P. McCONNELL.

A reply which contains a general denial of all matters set out in the answer, and an estoppel to the claim set up in the cross-petition, contains two defenses and should be separately stated and numbered.

HAMILTON, J.

This action was brought to foreclose a note and mortgage, making several parties defendants and one of the parties, A. W. Horton, answers and sets up that he is the holder of one of the notes secured by the mortgage as collateral security for the payment of another note; and asks that his rights be determined, and for affirmative relief. The plaintiff replies to all the answers filed in the case, and denies all the new matters set out in the several answers, and in reference to this answer and cross-petition of Horton, sets up matter by way of estoppel—that Horton ought not to have an action because the party from whom he got it is estopped; that Horton obtained the note after maturity and with full knowledge of all the facts. A motion is made by Horton to have the reply separately state and number the defenses so far as he is concerned. We think the reply contains two defenses—a general denial, and the defense of estoppel, and the motion must be granted.

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**\* EXECUTORS.**

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[Hamilton District Court, 1878.]

‡ROBERT COLLINS V. A. J. NUGENT ET AL.

The act of appointing a debtor as an executor, does not extinguish his liability on the debt.

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**\* PLEADING.**

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[Cuyahoga Common Pleas, May Term, 1878.]

†J. H. ROBERTS V. JOSHUA B. GLENN ET AL.

An answer in which defendant says he is ignorant as to whether plaintiff is the owner of a note sued on or indorsee of it, and therefore denies the same, is good and there is no way to avoid this sort of dilatory answer.

HAMILTON, J.

An answer is put in by the main defendant in the case, in which he says that he is ignorant as to whether the present plaintiff is the owner of this note or the indorsee of it, the petition saying that the plaintiff sues as the indorsee and the holder of a promissory note. He says he knows nothing of the facts in relation to that matter; and he therefore denies it.

A demurrer is filed to that answer. It is said that the language of that answer is such as not to be an averment, even though constituting a denial of the indorsement, and denying that

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‡For opinion in this case see 3 B., 519.

†See 1 Cleveland Reporter, 46.

the plaintiff is holder of the note; but that it is a denial of some other proposition contained in the petition.

We think, upon a fair construction of the answer, it must be held to be in substance a denial of the fact that the note was ever indorsed to the present plaintiff, or that he was the holder of it.

I have no doubt that this answer is for the sole purpose of delay; and yet, under the ruling of our supreme court, holding, in substance, that it may be denied upon information or lack of knowledge. I know of no way of avoiding this sort of dilatory answer. Taking the answer as it stands, we think it must be accepted, and not liable to a demurrer. The demurrer will be overruled.

### JUDGMENT.

[Cuyahoga Common Pleas, May Term, 1878.]

B. SELBERG v. R. A. DAVIDSON.

A motion to set aside a default judgment, on the ground that an answer could not be drawn on account of the petition being taken from the files by plaintiff's attorney, will be granted, the costs to abide the event of the trial.

HAMILTON, J.

The motion was filed on the first day of March, 1878, which was a day in the January term of this court. While the motion is silent as to when the judgment was rendered, yet, upon reference the court docket, I find that the judgment that is sought to be vacated was rendered on default at the January term. The reason given by the attorney why he was thus in default is, that he was unable to find the papers in the case; that he called several times and was informed that they were taken from the files by the attorney of the plaintiff; and he charges that they were thus taken from the files with the purpose and intent of preventing him from answering; says that he had no opportunity to see the files, never was able to find the petition, and that a judgment was thus taken on default, without any opportunity on his part to answer.

We think the defendant in the case was not altogether without negligence. We think it is perfectly competent for him on that state of facts, to make application to the court, either for an order to produce those papers, or for an extension of time. Still, if the facts are as stated in his affidavit, the plaintiff ought not to gain anything by that sort of practice. There is no affidavit contradicting the statements of the defendant's affidavit in this case. We think they are therefore both measurably in fault, and that the

195 defendant ought to have an opportunity\* of making a defense.

He says he has a good defense to the action. The motion will therefore, be granted, the case re-instated and set down for trial, and leave given to answer; but the costs of this proceeding will abide the event of the case.

**PLEADINGS.**

[Cuyahoga Common Pleas, May Term, 1878.]

**ELIZABETH ——— V. DAVID MORRISON.**

Where a motion to separately state and number the causes of action is made, an interlineation by uniting the number of the causes of action, is not a proper compliance with the order of the court.

**HAMILTON, J.**

The petition in this case was originally filed without separately stating or numbering the causes of action. It was a petition to vacate two judgments obtained by default by the present defendant against the present plaintiff, and for an injunction. A motion was made to require the plaintiff in this action to separately state and number her causes of action. That motion was granted. In compliance with that order of the court, the plaintiff took the petition from the files, and in its margin merely entered "Cause of action No. 1," and "Cause of action No. 2," and "Cause of action No. 3," opposite to the averments in the petition wherein it asked to have the two judgments severally set aside, and opposite to the averment in the petition where it prayed for an injunction.

A motion is now made to strike from the files this petition because the order of the court has not been complied with. We think the motion is well taken in this case. Leave to amend by interlineation must be taken from the court; and upon a general prayer and a general leave to amend it is not permissible to amend by interlineation. And if it was—if this practice could obtain at all, there could be no interlineation made in this case, because the docket nowhere shows what is to be interlined. It would be impossible to determine whether the party had complied with the order of the court or not, or what was interlined and what original.

The plaintiff, however, asks that, if the court shall be of the opinion that the motion is well taken, she have now leave to comply with the order of the court. That leave will be granted. The motion will, therefore, be overruled at plaintiff's costs. The court, however, would suggest that it may become quite important or the plaintiff in this case to determine whether or not he can have one petition to set aside two independent and separate judgments taken on default.

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**BASTARDY.**

[Cuyahoga Common Pleas, May Term, 1878.]

**FOWLER V. ZIMMERMANN.**

A plea in bar (a defense of former proceedings in a bastardy case and a settlement), cannot be tried on a motion to dismiss, for it must be submitted to a jury.

HAMILTON, J.

This case is here upon motion to discharge proceedings in bastardy. It would seem a proceeding was taken against the defendant before justice of the peace Buehne of this city, an examination of the complaining witness had her examination reduced to writing and the proceedings certified to this court in accordance with the law.

A motion is filed by the defendant to dismiss the action for the following reasons appearing from the evidence of the complainant herein certified: First, that she is not a resident of the county; second, that she has already made complaint on the identical charge of bastardy and had a settlement made therein as provided by law, and the law does not contemplate a repetition of the suit in every county in the state as often as complainant desires. It will be noticed by looking at the statute in reference to bastardy proceedings, that the complaint is authorized to be filed before any justice of the peace, and that a warrant may issue to any county in the state. The old act of 1824 required that the complainant should be a resident of the state, and provided that the complaint might be filed before any justice of the peace in the state. The present act passed in 1873 repeals all former acts and provides that the complaint may be filed before any justice of the peace, and that a warrant may issue to any constable or sheriff to arrest the party anywhere in the state.

I see no requirement in this last statute that the complainant must be even a resident of the state; but that any unmarried woman about to be delivered of a child, or who is pregnant with child, may make this complaint. The terms are general, and authorize any unmarried woman in this condition to make the complaint. I, therefore, do not see that there is anything in the proposition that she must be a resident of the county in order to authorize her to make the complaint. The motion as to that portion of it will be overruled.

It is further said that it appears from her examination that she has already had this party arrested, and that there has been a full and complete settlement of the case, or bond given in accordance with the law, and that that should preclude her from entering this complaint, and that this action should therefore be dismissed.

It will appear by looking at complainant's testimony that she did cause a proceeding to be instituted in the county of Seneca before a justice of the peace against this defendant. It further appears that a warrant was not served upon the defendant; that a return was made that he could not be found, and that he appeared there by an agent, and said that he was ready for trial; that a hearing was had, and that the sum of fifty dollars was paid to her by this agent of the defendant, and that a bond was given by the agent to the trustees of the township in which she then resided according to law.

It appears that subsequently, perhaps, if we are to look at the

transcript which has been filed, which we think we cannot do— but the fact was established that some months afterwards the defendant himself went before the justice of the peace and acknowledged that that settlement was all right, and entered in a bond, and also signed his name to this bond that was given to the trustees.

The complaining witness in her testimony says she received this fifty dollars as a sort of conditional settlement, that if the child was born dead then that was all she was to have; that upon that theory and that alone the settlement was made.

The statute requires that there shall be a full and complete settlement of the case to her full satisfaction. If we are to look at the testimony of this complaining witness such a compromise was not made—to her full satisfaction, but that it was a sort of conditional arrangement fixed up for the time being.

It seems, also, from that examination, that the defendant in this case admitted the transcript of the proceedings in Seneca county to the justice below; but as the statute does not require him to take any evidence other than that of the complaining witness we think that is not before the court.

Now, if there had been a complete settlement of the case, if that is true, then the question is whether it can be reached upon a motion to dismiss the action here. This proceeding is *quasi* criminal in its character, and the only form of pleading is the proceedings before the justice sent up here together with the transcript and plea entered in this court of not guilty. It is *\*analogous* in some sense to a criminal proceeding so far as the defendant's pleadings are concerned. It would seem to the court that if a compromise was had after they had begun the usual proceedings, that there should be perhaps a plea in bar *in pais*, in analogy to criminal proceedings. If we are to look simply at the testimony of the complaining witness, it does not appear that a full and satisfactory settlement was made. It does not appear to the court that we can go into an inquiry into the facts, upon a motion to dismiss the action, as to whether or not anything exists that is a bar to the action. It will be noticed, a plea in bar is to be tried and submitted to a jury. There is no other provision for disposing of a plea in bar. We think this question cannot be tried upon a motion to dismiss and the motion will therefore be overruled.

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## JUDGMENT.

[Cuyahoga Common Pleas, May Term, 1878.]

MARY ANN WILLIAMS V. WILLIAM HEISLEY, EX'R. ET AL.

The negligence of a party's attorney in not attending to the case is not ground to vacate the judgment for casualty or misfortune.

HAMILTON, J. (Abstract of decision.)

This is a proceeding under section 534 of the code to vacate decree on the ground of unavoidable casualty and misfortune. The original action was brought in this court in the year 1876 and was pending until November, 1877. The plaintiff says she employed one Reid of Delaware as her attorney, and that all papers when received by her she sent to him by mail; that he was her general attorney and empowered by her to attend to her business; that he continued to be her attorney for a number of months, and then signified to her his desire not to remain her attorney longer, and she then employed a man by the name of Sweeney, who continued thereafter as her attorney; that the first notice she received of the rendition of the judgment was several months after it occurred; that she has a good defense. She says further that she is an old lady, not living with her husband, nobody to advise with and direct her, and has to depend upon her attorneys; that there was another action pending between same parties in reference to the same premises, that when this action was brought she supposed the papers related to that action, which is now in this court, having gone to the district court and there reversed.

A demurrer is filed to this petition on the ground that there is not enough set out to warrant the interposition of the court. I can see nothing in the case except the negligence of the plaintiff or of her attorney. The case was pending here for about a year, and there is no pretense that she was not regularly and properly served. A judgment cannot be disturbed or interfered with where the defendant has been thus negligent.

J. S. Grannis and R. P. Spaulding for plaintiff.

John W. Heisly for defendant.

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### BILLS AND NOTES.

[Cuyahoga Common Pleas, May Term, 1878.]

WILLIAM D. ENGLD V. G. W. CANFIELD ET AL.

A petition by the indorsee of a note is not open to a motion to make more definite and certain by stating the date of the transfer of the note whether before or after due.

HAMILTON, J. (Abstract of decision.)

Action against maker and endorsee of promissory note. Petition in usual form. Copy of note attached to petition and made apart. Judgment asked for amount of note and interest. A motion is made to make petition more definite and certain by stating date of transfer of note, whether before or after due. Motion overruled.



**FORECLOSURE OF INDEMNITY MORTGAGE.**

[Cuyahoga Common Pleas, May Term, 1878.]

**G. G. HICKOX ET AL. V. ANN AVERY ET AL.**

In an action brought on the foreclosure of an indemnity mortgage given to protect a buyer against incumbrances, it is proper to set up with other claims not yet due, but which will become a lien.

HAMILTON, J.

A motion is made in this case to strike out from the petition certain matter claimed to be irrelevant.

The action is brought upon an indemnity bond. It seems that the plaintiff bought of the defendants certain lands in Norwalk, and agreed to assume an incumbrance of \$4,500, and no more, but there was a case then pending in the courts of Norwalk in which it was sought to subject this land to the payment of a certain claim against these defendants, and therefor an indemnity bond was given to cover any claim which might arise out of that litigation pending in the court at Norwalk. That bond was secured by a mortgage upon the same property. It is claimed that the conditions of that obligation have been violated; that there is an indebtedness due to plaintiff under the terms of the bond; and they ask to have the mortgage foreclosed and make other parties defendants, and ask them to set up their interests. The motion is to strike out that portion in reference to the litigated case pending in the Norwalk court as being immaterial. It is not claimed that anything is due in relation to that litigated case. They say they paid certain expenses in the way of attorney fees, etc., and there will be certain claims arise out of that case. They therefore ask to have a decree for the amount already due, and their interests to be protected as against this claim that may become a lien against the land thus bought.

We are of opinion it is pertinent to set out that matter in a foreclosure proceeding. It is analogous to a case where suit is brought to foreclose notes and mortgage, the petition asking for a decree for the notes due, and reciting that some of the notes will become due in the future.

The motion is overruled.

**\* REVIVOR OF ACTION.**

[Cuyahoga Common Pleas, May Term, 1878.]

**JESSE E. BISHOP, EX'R OF AMOS A. STODDARD, v. ANTONY M. STODDARD ET AL.**

Under section 411 of the Code (§5158, R. S.), which does not authorize a revivor within a year to be made without notice to the adverse party, and where an executor assigns, the action cannot be revived in the name of his successor without notice to the adversary party.

**HAMILTON, J.**

This case is now before the court on a motion to vacate certain decrees that have been heretofore rendered and permit certain parties who are legatees under this will to come in and defend.

The history of the case is, in substance, that Jesse P. Bishop, as executor of the will, had difficulty in determining what were his duties as such executor; and that, in 1874, for the purpose of getting a construction of the will and the advice of this court upon his duties as to the method of winding up the estate, he brought this suit, making the heirs and legatees parties to it. Most of the defendants, if not all, were non-residents, and service was made by publication as to them.

The stipulations of the will of the testator were, in substance, that he gave to his son, Ira Stoddard, who was then absent and had been for many years, the bulk of his estate, providing he should be found to be alive at the decease of the testator. It seems that Ira was the only child of Mr. Stoddard and his wife, and that he provided, in case of the death of Ira at the time of his decease, that the bulk of the estate, should go to a nephew by the name of Antony M. Stoddard. There were certain legatees, perhaps a half dozen of them, and it was provided that in case his estate descended to his son, he being alive, then these legatees should have but one hundred dollars as a legacy each. In case it descended to the nephew, Antony M. Stoddard—the bulk of it under the will, —then these legatees were to have one thousand dollars each.

The testator left a widow. He made some provision in the will by which she should have the use of the property; but she did not see fit to take under the will, and therefore was endowed as at law. The administrator, in his petition, avers the fact to be that Ira Stoddard, the son of this testator, was alive at the death of the testator, and therefore took the estate. Antony M. Stoddard, the widow and one other party answered, Antony M. Stoddard denying that Ira Stoddard was alive, and asserting that he was dead at the death of the testator, and that under the will, he, Antony M., became the chief beneficiary of the will.

This was the state of things down to about 1875, suit having been pending here perhaps a year or more. At that time, it seems,

an arrangement \*was made between the widow of the testator and Antony M., the nephew, by which so far as they were concerned, a journal entry was to be placed here upon the records containing a decree of the court, finding, in substance, that Ira was alive. 202

Another fact connected with it is, that if Ira was alive, he being the only child, having no brothers or sisters, his mother inherited from Ira; so that the decree thus entered would make the widow the chief beneficiary, taking the property. And such was the decree entered here by consent.

It is said upon the other side, that this decree was entered by an arrangement or compromise made between Anthony M. Stoddard and the widow of the testator, by which Anthony M. Stoddard got some eleven hundred dollars in order to get his consent to have such a decree entered here. That decree was entered, finding that Ira Stoddard was alive at the death of the testator, and that therefore the widow was his heir, and as such, was entitled to the substance of this property conveyed in the will.

It was further provided that the property should be turned over to her upon her giving a bond of some \$2,500 to Jesse P. Bishop as executor, to protect him against the claims of those other legatees. The property was arranged to be turned over to her upon her giving such a bond, to be satisfactory to the court. Such a bond was subsequently given.

This decree was taken, however, in term, it being provided in the decree itself that it was taken without prejudice to the rights of the other defendants who are named as legatees in these proceedings. This decree was drawn in 1875. The case was then continued as to all other parties, and in 1876, December 6th, Jesse P. Bishop resigned as executor, and December 7th, 1876, other parties were named, who, it seems, were interested in the estate, and were made parties to this proceeding, and who had consented to this former decree. They were named as administrators *de bonis non* in the place of Bishop as executor. On December 16th, 1876, they came into this court and suggested the cessation of the powers of Jesse P. Bishop as executor, and asked that they might be made parties plaintiff in the action in the place of and substituted for Jesse P. Bishop. That was granted, and a journal entry of that kind made, simply saying, that "upon motion of the administrators *de bonis non*, they are substituted in the place of Jesse P. Bishop, executor, who has resigned." Four days later, on December 20th, these administrators *de bonis non*, came in and took a decree confirming the former findings under the first decree, to wit: that Ira was alive at the time of the death of his father and therefore became the legatee under the will, being the chief beneficiary, and further finding that these legatees were entitled to have only a hundred dollars under the will.

It ran along from December, 1876, then, until some time in 1877, when that journal entry was corrected upon the motion of

these administrators *de bonis non*, showing affirmatively that three or four of these parties had appeared, to wit: the widow, Anthony M. and the executors of one of the deceased heirs; and further finding affirmatively that Jesse P. Bishop had paid these legatees the one hundred dollars to which they were entitled. It is now said in this motion that these journal entries, subsequent to the first one, which was had by consent, and which was not complained of, because it left the rights of these parties without being prejudiced in any way expressly in the decree—it is said that all these journal entries should be vacated and set aside because of irregularity in obtaining them. They say there was no revivor in the name of these administrators *de bonis non*. These parties were non-residents. And it is even said that while they were actually negotiating for a settlement and adjustment of this claim, they having been offered five hundred dollars to settle and adjust it, these proceedings were had without notice to them. There is no evidence, however, that such an offer was made; but that is the claim. The question is whether there is any power to revive this action in this way, without notice to the other defendants in this case. They set up affirmatively in the petition that this first decree was obtained by collusion between Anthony M. and the widow, by which Anthony was to get eleven hundred dollars, and that, as a matter of fact, Ira was dead at the time of the decease of the father, and that they are therefore entitled to one thousand dollars instead of one hundred, and therefore have been prejudiced by this decree. That petition is sworn to.

It would seem, then, that there is some merit in their claim that they have a right to come into this court and defend, unless they are precluded by the fact that they did not answer at all, and that this has been properly revived in this decree. They were in default of an answer all this time. Although they were constructively served by publication, they say they were not required to answer because Anthony M. had raised the issue by this answer. But so far as Anthony M. was concerned, his claim had been adjusted and settled in 1875 by the decree. It could scarcely be said that they were relying upon the answer of Anthony M. for a whole year after the claim had been settled. So that it leaves the matter substantially upon the question whether or not there was an irregularity in making this revivor.

Now, it is said upon the part of the plaintiff in this case, who desires to support these journal entries, that when a plaintiff is deceased, his representatives may come in, upon their own motion, or, without any notice to anybody, upon application to the court, may be substituted at once and immediately. They claim they have a right to do this under title XIII., chapter I., in relation to revivors; and they also claim that they have a right to do it under section 39 of the code. Section 402 of the code is as follows: "When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of

action survive in favor of or against his representatives or successor, the action may be revived and proceed in their names."

Now, this action, by the resignation of Judge Bishop, was abated and must be revived in some way in the name of his successor under the provisions of this act.

Section 403, the following section, provides: "The revivor shall be by a conditional order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the name of the representatives or successor of the party who died or whose powers ceased, and proceed in favor or against them."

Section 404: "The order may be made on the motion of the adverse party or of the representatives or successor of the party who died or whose powers cease, suggesting his death or the cessation of his powers, which with the names and capacities of his representatives or successor, shall be stated in the order."

Section 405: "If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent the order shall be served in the same manner, and returned within the same time, as a summons upon the party adverse to the one making the motion; and if \*sufficient cause be not shown 203 against the revivor, the action shall stand revived."

I am cited by the plaintiff to section 411, which reads as follows: "An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made."

Under that they say that where the plaintiff dies or his powers cease, the action may be revived in the name of the deceased party of the successor of the party whose powers cease *instantly*, upon application to the court, without any process or notice whatever.

Now, I do not think this section of the law in relation to revivors will warrant any such construction at all. It seems to me that a revivor is charged with notice whether the rights of the plaintiff cease and determine, and his survivor has to take his place, or whether it is those of the defendant that so cease. It is expressly provided in this section of the law that, in either case, this conditional order shall not be granted after the expiration of one year, unless it is by assent of both parties to the case, and that order shall be served as a summons in the case.

I am therefore of the opinion that this section of the law will not sustain the practice which was had in this case, and that it can only be survived upon a conditional order, and that must be served as a summons in the case.

It remains, then, to determine the construction of section 39, which reads as follows: "An action does not abate by the death, marriage or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue. In case of the marriage of a female party, the fact

being suggested on the record, the husband may be made a party with his wife; and in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

They say that this section is cumulative—this title XIII, in relation to revivors, and they cite the 24th Ohio State upon that subject; where it is expressly decided that it is so cumulative. The supreme court there say that if they comply with the law in relation to revivors under title XIII, they have a right to revive it absolutely; that it is not discretionary with the court; that in the other section it is a discretionary matter with the court, and they may grant it or refuse it as they see fit. But it seems to the court that under either section, if proceeding was had, it would be reviewable upon motion—if this discretion under section 39 should be abused, it would seem that that might be reviewed.

But this section 39 provides that it may be *allowed* by the court to be revived. How allowed? Under what form of practice? What are we to do in a case of that kind under that section? Must a notice be actually served, or must it be by a petition? In the 24th Ohio State they say that the code is based largely upon the practice in equity, and that the equity practice was by a bill of revivor, by a bill of revivor and supplement and by original bill in the nature of a bill of revivor. They say, that in analogy to that, they sanction the practice which was had in that case. In that case the year had expired. It was a case that was pending in the district court; and after a report by the referee, the plaintiff in the action had died. They then filed a motion to be allowed to revive in the name of the administrator of the plaintiff; and the motion was granted, with leave to file a supplemental petition and have process issued; and such was the practice that obtained in that case. It was objected on the trial when it got to the supreme court, being reserved by the district court, that the year had expired, and that this section of the law in relation to revivors controlled the whole matter, and if they brought themselves within that, that their action had ceased and they must commence the action anew. But they say that to commence the action anew—to allow the action to abate after the year had expired, would in some cases work great hardship, might be barred by the statute of limitations, and they say that while the subject is not free from doubt, yet they are inclined to hold this section in relation to revivors contained in title XIII as not exclusive, and that section 39 may be regarded as cumulative; and they therefore permit the old practice in relation to chancery proceedings.

It has been held in the state of New York that while the code is silent as to the method of procedure—that the practice which obtained prior to the existence of the code shall be regarded as

still in force. Now, what was the practice in relation to revivors in equity cases, this being entirely a proceeding in equity, prior to the adoption of the code in reference to revivors? Why, it was by a bill of revivor universally; and where the plaintiff deceased, his representatives could only be made parties to the proceeding by a bill of revivor; and that bill of revivor being filed, process was issued and notice was served upon the others, so that they might come in.

The first question is, perhaps, as to whether that was an action which survived; secondly, as to whether these were the proper parties to revive it in their name. It is not a subject that is free from doubt at all, by any means, and it is an important question to determine in the practice here. If this section 39 is as broad as is claimed by the plaintiff in this case, that the representative of a deceased party, or the successor of a representative can come in at any time upon a simple motion and without notice, after a party dies, or after the rights of a representative cease and determine, and revive it and take judgment in the action themselves, I apprehend that this section in relation to revivors never would be called into requisition, because the easiest, simplest method would be simply to call the attention of the court to it and get the case revived in the name of these parties. We think that is not in analogy to any former practice, the universal rule being the other way, and the universal practice being the other way; and until the supreme court shall say that upon a simple motion, without notice to anybody, or simple suggestion in court, that a case can thus be revived and these questions all be determined without notice to any body, we think we ought to hold in analogy to the former practice that some notice must be given. What the method shall be, whether it be by motion and notice, or whether it shall be by supplemental petition in accordance with the former practice, we do not undertake to say; but, we do think that notice of some kind ought to be given in this case.

We have therefore come to the conclusion that these journal entries—these decrees determining the rights of these parties were irregularly obtained. That being the holding of the court, we cannot set aside and vacate these journal entries, but we can reinstate the case. The entry will be that the case be reinstated, and when revived, that the issues be made up and tried between the parties.

Grannis & Griswold for motion; Ranney & Ranneys contra.

**\*VERIFICATION—PRACTICE.**

[Cuyahoga Common Pleas, May Term, 1878]

**GEORGE LANNERT V. DOMINICK PIES ET AL.**

A verification of a petition by plaintiff in which he merely says that the matters and things herein set forth are true, without referring to the petition as his petition, is not sufficiently definite and certain; but while a motion is pending to strike such petition from the files, a default judgment is taken, which is now asked to be set aside, a new petition and summons is not necessary, but the decree will be set aside, and the verification amended.

HAMILTON, J. (Abstract of decision.)

This was an action to foreclosure a mortgage given to secure a promissory note. One C. Reuscher, who had subsequent to execution of the note and mortgage by Pies and wife, bought the premises, assuming to pay the note and mortgage, was also made a defendant. The plaintiff asks a judgment against Pies and Reuscher and for an order of sale.

In March, 1878, Reuscher filed a motion to strike the petition from the files on the ground of defective verification. On the 6th of May, Pies and wife being in default, the plaintiff took a decree and an order of sale issued, the motion to strike the petition from the files being at that time undisposed of. A motion is made to set aside this decree, which should prevail.

The case then stands upon the motion to strike the petition from the files. The verification is in these words: "The state of Ohio, Cuyahoga county, ss. George Lannert, being first duly sworn, says that the matters and things herein set forth are true as he verily believes." There is no reference in this verification to the petition. It does not show that Lannert swears to the petition as his petition. He swears to "the matter and things herein set forth," to wit, in this affidavit. We do not think the verification sufficiently definite and certain but the parties having come in and asked to have the decree vacated, we think it would be entirely useless to strike the petition from the files and have a new petition filed and a new summons issued. The verification may be amended and the motion will be overruled.

Foster, Hinsdale and Carpenter for plaintiff.

Kessler and Robinson for Reuscher.



**PLEADING—LICENSE—FRAUD.**

[Cuyahoga Common Pleas, May Term, 1878.]

**AUGUST M. DERBY V. SPENCER CORLETT ET AL.**

1. In an action for damages for entering plaintiff's property and taking away certain personal property, defendant pleaded a license under conditions of a chattel mortgage, reply that the notes and mortgage sued on were obtained by fraud and misrepresentation, such reply is not demurrable, and is not wholly a legal conclusion, but contains an averment of fact.
2. A license, in defense of a trespass, which is procured by fraud, is no defense, and it is not necessary to expressly revoke it, hence a reply that it was obtained by fraud is not demurrable.

**HAMILTON, J.**

This is an action brought for damages sustained by wrongfully entering into the premises and property of the plaintiff and taking and carrying away certain articles of personal property. The answer sets up that the defendants were acting under and by virtue of a license and permit granted to them by virtue of a chattel mortgage upon the property, the chattel mortgage being given to secure two notes. It sets up, also, a failure to pay the notes, that the mortgage has become absolute, and that by the terms of the mortgage they had a right at any time, in case of waste or in their opinion it became necessary for their security to take the property, to do so; that they were acting under the authority of this mortgage.

The reply avers that the mortgage and notes were obtained by fraud and misrepresentation, and were without any consideration whatever. A general demurrer is interposed to this reply. It is said first, that to aver fraud and misrepresentations is not enough; that the facts must be set out, showing what the fraud and misrepresentations consist of, so that the court may determine whether or not there was any such legal fraud or misrepresentation as would constitute a cause of action; that the simple plea that it was done by fraud and misrepresentation is a legal conclusion and not a statement of any fact. It is said further, that where a license has been granted, as in this case, or a permit specially given, that even though it were procured by fraud originally, that there must be, upon the discovery of the license, an express revocation of the fraud, and that until that time they would be justified in acting under the license thus given.

It is the opinion of the court that this demurrer should be overruled for the reason, first, that it is expressly stated that the notes and mortgages were without any consideration whatever. That is one ground. It was decided in the 15th Ohio State, in the case of *Chamberlain v. The Painesville & Hudson Railroad Company*, where the averment in the answer was, that the note sued upon was without consideration, wholly void, and issue was taken upon

that, that it constituted a good defense, and that any testimony might be taken under it going to invalidate the consideration. It was claimed in the argument of that case, that it was not a defense without setting up the facts. They expressly say, while it may have been open to the objection to be made more definite by a statement of the facts upon which the defense was based, that it is denial of a material averment in the petition; so that they substantially hold in that case that a simple statement that there is a lack of consideration, would be good on general demurrer. In the 6th Ohio there was a case decided by Chief Justice Wood, where a suit was brought upon a note under seal, and the defense was that it was procured by fraud, covin and misrepresentation. A demurrer was interposed to the petition. It was claimed that it was necessary to set out the facts which constituted the fraud, covin and misrepresentation; but the court expressly decided in that case that the petition was good on general demurrer. Since the adoption of the code, it seems to me that an averment of fraud and misrepresentation is an averment, perhaps, in part, of a legal conclusion, but also includes an averment of fact. When fraud is averred, it is always a mixed question of law and fact.

We do not think it is any objection to say that because they had a license that was procured by fraud, that it must be expressly revoked. It would seem to the court that where a party obtains a license by fraud and misrepresentation, which is acknowledged to be so by this demurrer, that he cannot plead such license as a defense, or if he did the plea would do him no good if a cause of action otherwise existed. The demurrer will be overruled.

W. S. Kerruish for plaintiff; Wilson & Sykora for defendants.

### EVIDENCE.

[Cuyahoga Common Pleas, May Term, 1878.]

JOHN KELLY ET AL. v. JOHN INGERSOLL ET AL.

The production of books and papers by the opposite party as provided for by section 360 of the code, (§ 5289, R. S.), does not authorize compulsory production in an examination of the adverse party before a notary before trial, but refers to this production at the trial either before the court or a master or referee.

HAMILTON, J.

This case is now before the court upon a motion to compel one of the defendants to produce certain notes, papers and books of account, which it is said are necessary to make out the plaintiffs' cause of action, and they want an order from the court requiring the defendants to bring them into court and deliver them to the plaintiffs' in the action, or to the plaintiffs' attorney, or to some other person designated by the court.

The action seems to have been brought for the purpose of setting aside a trust deed, and making the trustees account for certain moneys which have come into their hands, and charging them with having committed waste, and many acts which were inconsistent with a strict and correct performance of their trust obligations. \*They say that the trust was created originally through the fraud of these defendants; that the deed or contract which was executed creating the trust, was obtained of the plaintiffs by false representations of the defendants. All these statements are substantially denied by the defendants in their answer. Since that time there have been various pleadings in the case; an injunction was obtained which was afterwards partially modified—vacated. But the plaintiffs have since then undertaken to examine before a notary public some of these defendants. It is claimed by the defendants that the parties were residents here; that they were not old or infirm and that there was no prospect of their not being in court: but that it was a mere fishing expedition for the purpose of ascertaining something from the defendants to help make out the plaintiffs' case. It appears from the papers and perhaps not denied that while being examined before this notary public, after having submitted to it a long time, the defendants refused to proceed further in that examination, and at the same time offered to produce for the inspection of the plaintiffs, a copy of any notes or books of account, bank books or otherwise, that the plaintiffs might request, that they would do this upon affidavit, if necessary, as to the correctness of those copies; but that no demand has ever been made upon them to do that.

In this state of the case the plaintiffs file a motion in this court asking for this order to produce these books and papers, mortgages and notes, the mortgage and notes, it is claimed, being a part of the trust estate. They say that these matters are pertinent to the issue, and they want an opportunity to inspect and take copies.

This application is founded upon the 360th section of the code, S. & C., page 1045. The first paragraph of this section is as follows: "That the court where any action is pending, shall have power, on motion, on ten days' notice thereof, to require the parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore be compelled to produce the same by the ordinary rules of proceeding in chancery; and if the plaintiff shall fail to comply with such order to produce books or writings, the court, on motion as aforesaid, may give like judgment for the defendant, as in case of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, the court, on motion as aforesaid, may give judgment against him by default."

The clause of the paragraph just read is the one relied upon in this motion. The next clause reads as follows: "Either party, or

his attorney, may, also, demand of the adverse party, an inspection and copy, or permission to take a copy of a book, paper or document, in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion, or notice, to the adverse party, may, in their discretion, order the adverse party to give the other, within the specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be."

The result of this motion depends upon the construction to be given to the first clause of section 360. The language is that the parties upon motion may be required to produce books and writings in their possession or power. The object of this motion is to have them delivered to the plaintiff, or to the plaintiff's attorney, or to some one designated by the court, the purpose being to get an inspection of the papers.

My idea of the statute is, that this provision relates to the production of these books and papers upon the trial of the case, either in court or before a master or referee. This is to be done in all cases where it would be done in like circumstances under the practice that formerly obtained in proceedings in chancery.

I find by looking at the 17th Ohio State, a report of a case which was a proceeding under this very clause of section 360 of the code. There the motion was to produce the papers upon the trial, and such was the order of the court. I find by looking at the statutes in existence before the passage of the code, that we had an act identical in language with this act, and under that act the forms as laid down by Wilcox and all other writers upon the subject are that they produce the papers upon the trial of the case, either before the court or before a master or referee.

I am led to this conclusion from the next succeeding clause which I have just read, which relates to procuring an inspection of the documents themselves. It certainly cannot be said that there are two clauses of the same section relating to the same subject matter, "either party or his attorney may also demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document, in his possession or under his control containing evidence relating to the merits of the action or defense therein."

Now, that paragraph of the section is applicable, in my judgment, to obtaining an inspection of books and papers that may be needed for the purpose of advancing the interests of either side. In this case there is no pretense of any proceedings having been

instituted under that paragraph of this section. I am inclined to think that counsel have misconceived the purport of the language of the first paragraph of the section; that it is not for the purpose of having them produced or handed over to the plaintiff or his attorney, or to anybody else, simply for the purpose of procuring an inspection, but is for the purpose of getting possession of them at the trial to be used as evidence in the case; because the act provides in case they are not produced, judgment may be given by the court against the party by default. The motion therefore, will be overruled.

Foster, Hinsdale & Carpenter for plaintiffs; Estep & Squire for defendants.

### WITNESSES.

[Cincinnati Superior Court, General Term, 1878.]

MICHAEL ROLAND, ADM'R OF ELEANOR EVANS v. RICHARD GRIFFITHS, ADM'R WITH WILL ANNEXED OF EDWARD W. EVANS.

Under section 313 of the code, in a suit between administrators of different estates, heirs and legatees who will derive the chief benefit from the result of the suit, but are not parties thereto, are not disqualified from testifying in such suit.

For opinion in this case see 7 Rec. 115.

### JUSTICE OF THE PEACE.

[Hamilton District Court, 1878.]

STATE EX REL. FRED BRAUN v. HENRY HARMYER, JUSTICE OF THE PEACE.

There is no provision authorizing a review of the findings of a justice in forcible entry and detainer, as being against the weight of evidence, if, therefore, there were no exceptions to rulings of law, or on evidence, or because there was no evidence to support the finding, which would make the finding against law, the justice is not obliged to sign a bill of exceptions.

For opinion in this case see 3 B., 570.

### NEGLIGENCE.

[Cincinnati Superior Court, General Term, 1878.]

THE PITTSBURG, CINCINNATI AND ST. LOUIS RY. CO. v. MARY WERNISING, ADM'X.

A passage in a charge to the jury, that if a man of ordinary prudence, knowing what the deceased did, and seeing what he saw, situate as he was, would have done as he did, he was not guilty of contributory negligence, and such charge is not erroneous.

For opinion in this case see 3 B., 592.

**\* INSURANCE.**

[Cuyahoga Common Pleas, May Term, 1878.]

† **IGNACE MINERICK v. THE PEOPLE'S MUTUAL FIRE INS. CO.**

1. Where the house insured is a part of a freehold described as being within the county, it sufficiently appears that the loss occurred within the county.
2. When a policy of insurance contains a proviso that no suit or action shall be sustainable against the company unless commenced within twelve months after the loss occurs, it devolves upon the plaintiff, the policy being made part of the petition, to show cause for delay if not commenced within the time specified.

**HAMILTON, J.**

The plaintiff in this action avers that the defendant duly insured for him a certain house, which he describes as being located upon certain premises in the township of Independence, in this county; and he says that, during the life of the policy, the house was burned and destroyed; that he has made due proof of his loss—in short, has complied with all the conditions required of him to be performed by the policy; and that there is now due to him the sum of \$500 from this defendant, by reason of the premises.

To that a demurrer is interposed. The first ground of demurrer is as to the jurisdiction of the court, it being averred that the petition does not show that there is any jurisdiction of the person or of the subject matter. It is said that the statute of this state permits insurance companies to be sued in the county where the loss occurs, or in the county where the principal business office of the defendant is located; that it appears that the principal office of this company is located in Ravenna; and that it does not affirmatively appear that the loss occurred in this county. The policy itself, which is made a part of the petition, distinctly describes the house as located upon certain premises in the county of Cuyahoga. We think, then, that it must be fairly inferred that, where the house insured is located on or is a part of the freehold, and the freehold is described as being within the county, it sufficiently appears that the loss must have occurred within the county. Besides, that we think it would be a matter of defense to bring it up by way of answer, if anything of that kind occurred. When a party is sued, though he may not be a resident of this county, if it does not appear on the face of the petition that he is not a resident of the county, then, I apprehend, it would be cause of defense and could not be taken advantage of by demurrer any more than it could in this case. As to the first ground of demurrer, then, the demurrer will be overruled.

There is another ground of demurrer: that the petition does not state facts sufficient to constitute a cause of action; and this is based upon this proviso contained in the policy: "It is hereby ex-

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† See 1 Cleveland, 134.

pressly provided and mutually agreed that no suit or action against this company for the recovery of any claim shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

It appears affirmatively from this petition that the action was not commenced until after a year had elapsed from the time of the loss complained of. We think, then, under this clause of the policy, the policy being made a part of the petition itself, so that it sets out this clause as a part of the petition, that it devolved upon the plaintiff to show some reason why this action was not commenced within a year; and in the absence of any excuse for delaying it, the time of the \*policy expressly providing that the party shall be barred of any suit or action after the expiration of twelve months, this petition is rendered defective in this particular, and the second ground of demurrer will be sustained. 218

Peter Zucker for plaintiff; A. T. Brewer for defendant.

### PLEADING—AGENCY—DECEIT.

[Cuyahoga Common Pleas, May Term, 1878.]

THOMAS JENKINSON v. JABEZ S. STONEMAN.

1. If a seller's representations as to his lands, though relied on, are stated by him not to be repetitions of what others said when he bought, and he states that he never saw the land, this, if honestly said, is not actionable deceit.
2. Averment of damages resulting from the commission of an act of fraud, is a statement of a fact, and though perhaps open to a motion so as to show how the damages were caused, yet the averment of the fraud and consequent damages is good on demurrer.

HAMILTON, J.

The petition in this case avers that Jabez S. Stoneman, the defendant, at a certain date, desired to procure of the plaintiff a loan for a third party. It states that the defendant was acting for and on behalf of this third party, and came to the plaintiff and made certain propositions, to wit: that certain premises here, consisting of a number of sub-lots, were abundant security for this loan. He further stated to him that there were no mortgages, no incumbrances, no liens of any kind, upon the property; and upon the plaintiff suggesting that he ought, perhaps, to make an investigation to see if it was entirely clear, the defendant said to him that that was entirely unnecessary; that he had made an examination, and that he need not do that; he knew that it was free and clear, and was abundant security; that there were no claims upon it

whatever. It avers that he made these representations "falsely, fraudulently, with the intention to deceive, cheat and defraud this plaintiff;" and that the plaintiff, relying upon these representations, made this loan to these parties. The plaintiff says that, as a matter of fact, the premises were encumbered, at the time these representations were thus made, and at the time of the loan, to a very large amount—even to their full value; so that the security which he thus obtained from the party to whom the loan was made was absolutely and entirely worthless; and that, by reason of the premises, he has been damaged in the sum of \$4,000.

To this there is a demurrer interposed, upon the ground that the petition does not state facts sufficient to constitute a cause of action. It is said, first, that the petition does not state that this defendant was acting as the authorized agent of the party to whom this loan was made. As to that objection, if it was necessary to aver agency in the premises, we think it is sufficiently averred in the petition; for it distinctly states that he was acting for and on behalf of this third party. But we do not think it is necessary to make any such averment. We think a man may be guilty of fraud and of deception whether he has any agency for any party in the matter at all or not, or whether he reaps any benefit from the fraud that is perpetrated. If he knowingly and wilfully acts fraudulently in the transaction, for the purpose of deception, it matters little whether he is acting as agent or as principal; he will be personally liable, providing damages ensue from that fraud thus perpetrated.

It is further objected that the language of the petition is such that it discloses a state of facts of which the plaintiff ought to have taken notice, just as much as the party perpetrating the fraud; that the records were open to him for inspection here, and that it was his duty to exercise some care, some circumspection, before making the loan; that he should have made a personal examination or procured somebody to make an examination for him. We do not think this objection well taken. We think that, when a party thus perpetrates a fraud by saying that he personally knows and has made an examination of the records himself, and uses means to prevent the other party from taking steps to inform himself, which he might otherwise have done, through that instrumentality, it is a wrong upon the other party, and the party perpetrating the fraud is responsible for that wrong. We also think that when he untruthfully and fraudulently avers that there is no encumbrance, that he knows it of his own knowledge, and has made an inspection, he is responsible for such a representation if damages ensue. We therefore think that that objection is not well taken.

It is further objected that the petition merely avers, after stating these facts, that the plaintiff has thereby sustained damage in the sum of \$4,000; and it is said that, supposing all these facts to be true, that he perpetrated a fraud on him, that the loan was thus made, it does not appear anywhere, by any averments in the peti-



tion, but that he has been fully paid by the party to whom the loan was made, or that he has suffered any loss whatever from it; and that it does not follow from the facts set out that he has been damaged; therefore, it is objectionable on that ground. We are of the opinion that that objection is not well taken. It is an averment of fact: that he has been damaged. The demurrer admits every allegation of fact set out in the petition. It is a fact, that is thus admitted, that he has been damaged. If a fraud has been perpetrated and damage has ensued, that makes a case. The simple averment that damage has thereby resulted to him is an averment of fact. It is true it does not set out the frauds from which the damages wholly results; but it is nevertheless, an averment of fact; and there is an admission of that by the defendant in his demurrer. True, the facts not being set up, the defendant, by his demurrer, does not admit the facts upon which the plaintiff bases his damages wholly and fully.

If a motion had been made here to make this petition more definite and certain in this respect—to show more fully and definitely by what means this damage resulted—that might well have been sustained. But it cannot be said that where a party avers a fraud and a consequent damage, and that averment is admitted by a demurrer, the petition is defective. The demurrer will be overruled.

Grannis & Griswold for plaintiff; Stone & Hessenmueller for defendant.

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### PLEADING—MORTGAGE.

[Cuyahoga Common Pleas, May Term, 1878.]

JOHN REUSCHER v. MATHIAS HUDSON.

An answer of general denial of everything not specially admitted, is sufficiently broad not to be open to a demurrer.

HAMILTON, J.

This case was originally brought by Reuscher against Hudson and wife for the purpose of foreclosing a mortgage which secured a note. An order of sale was taken during the pendency of that action. Josephine Ruescher came into this court, and, upon her own application, was made a party. She sets up that she was formerly the wife of John Ruescher, and that, during the pendency of this action, she obtained a divorce against her husband, and that, in that divorce, she has, by the terms of the alimony therein granted, a lien upon this mortgaged property, or the interest of her former husband in the mortgaged property, as indicated by the mortgage itself and note.

There is a reply to her answer by the plaintiff, in which he admits that a divorce was granted during the pendency of this ac-

tion, and that alimony in the sum of \$250, as stated in the answer of Josephine Ruescher, was obtained; but he denies that there was any lien whatever growing out of that transaction upon his interest in those mortgaged premises; and he \*winds up with a general denial—"denies each and every other allegation and averment in said cross-petition contained, except as hereinbefore expressly admitted or denied."

To this reply of John Ruescher, the plaintiff, a general demurrer is interposed.

We think that the terms of the reply are sufficiently broad to put it out of the objection by a general demurrer. Everything is denied except what is expressly admitted; and, though he admits that a divorce was obtained, yet, he denies in substance everything else.

The demurrer must be overruled.

Stone & Hessenmueller for plaintiff; Young & Green for Josephine Ruescher.

### BILLS AND NOTES—PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

BARTLETT ET AL., PARTNERS, ETC., v. M. M. JONES AND  
T. D. JONES.

1. An answer by an indorser not in the claim of title being sued as maker, that he signed it as an indorser, is defective, for it avers no agreement with any one, and the law would then presume, in the absence of any such agreement, that the note was signed by him as guarantor.
2. Where an answer sets up a partial defense, as of payment or of usury, though it does not meet the whole case, a general demurrer will not lie, else if overruled judgment would go for the whole.

HAMILTON, J.

This is an action brought upon a promissory note signed by M. M. Jones on the face of it, as the maker, and indorsed upon the back of it by Thomas D. Jones, he apparently being a stranger to the note and having indorsed it, as averred in the petition, before its delivery to these plaintiffs; and the plaintiffs say that he thereby became a maker of the note. They therefore sue the two defendants as makers. They further aver that at the date of its maturity, the note was duly presented for payment, and protested for non-payment, and that notice of the fact was given these parties. They therefore claim for the amount of the note and interest and \$1.65 costs of protest.

M. M. Jones does not answer.

Thomas D. Jones makes an answer, in which he says that he signed the note as indorser. He does not set out that he made any agreement with anybody that his liability should be that of an in-

dorser; but he says simply that he signed it as an indorser. He does not deny anywhere that it was thus signed by him before delivery to these parties and at the time of the execution of the instrument.

We think the presumption of law is that he signed it as maker or guarantor. That is expressly decided by our supreme court in several cases.

This answering defendant further states that this note was never presented for payment, and that it was never protested.

A general demurrer is now interposed by the plaintiffs to this answer. We think the answer is defective in not more fully setting out the understanding under which he signed the note; that the mere fact that he signed it as indorser, retaining in his own mind the idea that he would become indorser, without making it known to anybody—without any understanding or agreement with anybody—does not make him an indorser; that the law would then presume, in the absence of any such agreement or understanding, that the note was signed by him as guarantor.

This demurrer is general: "That it does not state any defense." We think there is a defense to a part of this cause of action, to wit: the \$1.65 costs of protest. He says distinctly that there was no protest ever made. It is therefore a defense to that portion of the plaintiffs' claim; and the plaintiffs' claim is set out as one entire cause of action, in which they desire to recover for the principal of the note and the costs of protest.

Where an answer sets up a partial defense, as of payment or of usury, though it does not meet the whole case, a general demurrer will not lie. If it would, then they could dispose of this answer by a general demurrer, and take judgment for the full amount, including the costs of protest. But that issue is squarely made, the plaintiffs averring that the note was protested, and the answering defendant averring that no protest was ever made. If there was none, there could certainly be no right of recovery for the costs of protest.

The demurrer, upon this ground, must be overruled.

Prentiss, Baldwin & Ford for plaintiffs; W. S. Kerruish for defendants.

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## FORECLOSURE OF MORTGAGE—PLEADING.

[Cuyahoga Common Pleas, May Term, 1878.]

JOHN SOMMERS V. JAMES HAWKINS ET AL.

In an action to foreclose a mortgage, in which plaintiff avers that defendant duly executed and delivered the note to plaintiff, and that a certain amount is due on it, sufficiently avers ownership of the note.

HAMILTON, J.

Where a note is made directly by the defendant to the plaintiff, the plaintiff averring that it was duly executed and delivered by the defendant to him, and that there is a certain amount due upon it, by fair implication, there is an averment of ownership.

Demurrer overruled.

James Fitch for plaintiff; Gage & Canfield for defendants.

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**\*REFERENCE.**

[Cuyahoga Common Pleas, May Term, 1878.]

JOSEPH R. ARTER V. GEORGE T. CHAPMAN, ADM'R.

1. The trial of a case before a referee or special master is substantially the same as a trial before the court, and the report of such referee or special master cannot be reviewed unless the evidence is *all* submitted for the consideration of the court.
2. Where the referee is not to report all the testimony, it is necessary, as to the findings of fact, before the court will review his report, to file a bill of exceptions, setting out all the testimony.

HAMILTON, J.

This case is here upon exceptions to the report of a referee or master. The action was originally commenced by Joseph R. Arter as the assignee of Shotter, Paul & Arter, who, it seems, were in the wholesale grocery business in this city. Shotter deceased, and George T. Chapman was appointed his administrator. It is in evidence that Shotter was insolvent; that he put but a very small amount of capital stock in this concern, the capital stock being in substance furnished by Arter and Paul; and it is said that, at the time of his death, he had not only drawn out all the capital stock that he had ever been credited with (which, I think, was a thousand dollars), but that he was indebted to the firm; so that, practically and really, he had no interest in the firm. It was said that Chapman, after continuing as administrator for some time, representing the estate to be insolvent, made an adjustment between himself and Arter and Paul, the surviving members of the firm, by which it was agreed, as Chapman claims, that they were to take all the assets of the firm, collect all the debts, retain what money they had collected of the debts, and take all the stock; that all this was done at a full and final adjustment and settlement of the liabilities and assets of the firm, it being understood that Shotter was never to get anything more; that Chapman made his report to the probate court; that the report was there sanctioned and agreed to, and that this agreement, in fact, was by the consent and with the advice of the probate judge. Chapman claims that that adjustment was a full settlement of Shotter's liability to this firm.

Arter, upon the other hand, claims that that was not the case; that it was simply a purchase of the claims in favor of the surviv-

ing members of the firm, leaving the liability of Shotter to the firm as it was before—simply a disposition of the assets of the firm. And Arter says that he subsequently purchased of Paul all his interest in these claims and in this claim against Shotter; so that he stand here as the assignee of the firm, claiming against Shotter, and as such has brought his suit in this court against Chapman, the administrator of Shotter. The case, by consent of the parties, was referred to J. D. Cleveland as referee; and, upon a full hearing, he reports that, as a matter of fact, he finds that Shotter owed the estate between two and three thousand dollars; but he also finds that there was a full and complete settlement between the parties, represented on the one hand by Chapman as administrator, and on the other by Paul and Arter as surviving members of the firm; and that therefore the plaintiff has no cause of action. Exceptions are filed by the plaintiff to so much of this report as relates to the settlement. To no other portion of the report is there any exception filed.

The journal entry referring this case to Mr. Cleveland is as follows:

"By consent of parties, this case is referred to J. D. Cleveland as special master, for him to hear and determine the issues in the case, and to report his findings, and so much of the evidence as shall be offered, outside of the books of account and exhibits from the files of the probate court."

It will be seen that he was not to report the whole testimony, but only the verbal testimony offered upon the trial before him.

We are now asked to review the report of the referee or the special master upon the findings of fact, when it seems to us that only a part of the testimony is before us for consideration. We think it is clearly decided in the 7th Ohio State, and in the 22d Ohio State, that the trial of a case before a referee or a special master is substantially the same thing as a trial before the court itself; that the referee is acting for and taking the place of the court; and that a review of that decision or the findings of fact before the referee cannot be had, unless the evidence is all submitted for the consideration of the court; that it becomes necessary, as to the findings of fact, where he is not to report all the testimony in the case, to file a bill of exceptions, setting out all the testimony, in the same manner as a bill of exceptions would have to be filed in this court to take the case to the district court. Otherwise, there is no method that we can see, with such a reference, to bring all the testimony that was heard by the referee or master before this court for review. Such I apprehend to be the clear decision of our supreme court in the cases referred to.

Much stress is laid upon certain exhibits, to wit: the reports of this administrator to the probate court in his final settlement, which are said to be contradictory to the evidence now, and are relied upon as proof of certain facts that actually took place. These exhibits, it seems to the court, are not before us for review.

Taking that view of the case, we are of the opinion that we can do nothing else than confirm this report in every particular. If we were at liberty to look at the testimony as we find it in this partial report, outside of these exhibits, it being testified by the administrator and the probate judge that such a settlement was actually had, and that it was there duplicated by Arter himself, that he desired that the widow should have everything there was left out of the estate, and that all he wanted was to get a settlement and adjustment of it, and nobody appearing upon the other side of the case but Arter himself, we should be very much inclined to hold the same opinion as to the findings of \*fact that the referee did in this case. But we are inclined to think that we are not at liberty even to do that, because our opinion is that all the testimony is not before this court.

The exceptions will, therefore, be overruled.

E. D. Stark for plaintiff; Tyler, McKinney & Chapman, Cadwell & Marvin and H. C. Ranney for defendant.

### PLEADING—VERIFICATION.

[Cuyahoga Common Pleas, May Term, 1878.]

VACLAV JIRAVA v. JOHN BRIESKA ET AL.

1. A verification to an answer by one as "attorney of the defendants," means as attorney of all the defendants.
2. Where an attorney verifying a pleading sets out in his affidavit that all the matters and things contained in the pleading are within his personal knowledge, is a sufficient reason why the affidavit was not made by the party.

HAMILTON, J.

This action is brought on a note and mortgage set out in the petition. The main defendants file an answer and cross-petition. A motion is made to strike off this answer and cross-petition because of a defective verification, as is claimed.

The verification is: "J. W. Sykora, being duly sworn, says he is one of the attorneys of the defendants in the above entitled action, and that the matters and things in the above answer contained are true, as he verily believes; and that said matters and things are within the personal knowledge of affiant."

The first objection is that the affiant says that he is one of the attorneys of the defendants, and that there are a number of defendants besides these answering defendants, for whom he attempts to verify. It would seem to the court that, taking the phrase "one of the attorneys of the defendants" in its broad sense, it would mean one of the attorneys of all the defendants; but in its literal sense, one of the attorneys of these answering defendants. The person verifying also appears to be the attorney of record. We think there can be no objection to the verification upon that ground.

But it is said that he must not only set out that the facts stated in the answer are within his personal knowledge, but also the reason why the answer is not sworn to by the real defendants in the case. It is true the statute makes that distinction and says that the reason must be set out why the affidavit is not made by the party himself. But we think, when the attorney making the affidavit, sets out that the matters and things are within his personal knowledge that is a sufficient reason why the affidavit is not made by the party himself; just as in an action in relation to a thing evidenced by a note or any other instrument for the payment of money, when the person making the affidavit sets out that the instrument is in his possession, that is a sufficient reason why the party did not make the affidavit. We think the practice has been uniform upon that subject, and that, when that is set out, the affidavit upon its face shows a sufficient reason why it is not made by the party.

The motion will be overruled.

J. M. Nowak, for plaintiff; Wilson & Sykora, and J. M. Nowak for defendants.

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### \*HUSBAND AND WIFE—SEDUCTION.

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[Cuyahoga Common Pleas, May Term, 1878.]

#### WALBURGA SCHEURER V. FRANZ SCHEURER AND THERESA SCHEURER, HIS WIFE.

A wife may maintain an action against any one who shall deprive her of the services, affections, etc., of her husband; and if the husband, after divorce, marry his seductress, he becomes liable to such action.

HAMILTON, J.

The petition avers that at a certain date this plaintiff, Walburga Scheurer, and Franz Scheurer were husband and wife; that while that relation subsisted between them, Theresa Scheurer, one of the defendants, incited and induced the husband of this plaintiff to abandon her (the plaintiff); that she was thereby deprived of his society, services and affection.

It further avers that, having thus induced him to separate from the plaintiff, she lived and cohabited with him—had carnal knowledge of him; that, after some months had elapsed, a divorce was obtained by Walburga Scheurer, the plaintiff, from her husband; and that he, after the divorce, married his codefendant, Theresa Scheurer.

Walburga Scheurer now brings this action against Franz Scheurer and Theresa Scheurer (who, it is averred, are now husband and wife), to recover for the grievance thus committed while she was the wife of Franz Scheurer.

A demurrer is interposed to the petition, and presents a novel question. It is said that a wife cannot maintain \*an action for the seduction and loss of the affections and services of her

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husband, and that it cannot be maintained against her husband in any event.

There is a case in the 1st Superior Court Reporter that asserts the doctrine that a married woman is entitled to bring an action against anybody who harbors her husband, takes him away from her, etc., and thus deprives her of his services and affection. It is conceded that a man has a right of action against any one who shall thus induce or incite his wife to leave him, thus depriving him of her services and affections; and no distinction is perceived, as the court there say, between the rights of a married man and those of a married woman; the wife certainly has as much interest in her husband's services, affections and protection as the husband can have in those of his wife. The court cite several case in support of this doctrine, notably one that was decided in the House of Lords in England; and we do not see why that reasoning is not sound and logical—why the wife should not be permitted to have a remedy, upon the general principle that every wrong should have its remedy.

Under an act passed in this state, the wife is permitted to own in her own right, all property which came to her by marriage, or which shall have accrued to her by her personal services and earnings during coverture, or which shall have grown out of the violation of any of her personal rights. If that be so, she would have a right to sue for it in her own name. Under that view of the case, when this cause of action arose, while the relation of husband and wife subsisted between the plaintiff and her husband, she would have had a cause of action against this defendant, Theresa Scheurer. The court, in the Cincinnati case, hold that, while the wife would have such right of action against a woman thus doing the injury, the relation of husband and wife would not permit her to sue her husband, except through proceedings for alimony and for her separate support. But if we establish the doctrine that Theresa Scheurer is liable in this action, then another principle of law intervenes, to wit: that where a woman is guilty of trespass or owes a debt, and subsequently marries, her husband, upon marrying her, not only assumes her debts contracted prior to coverture, but he takes her charged with her torts, with her trespasses, with her libels. That is the common law doctrine. If that be so, this defendant, Franz Scheurer, in marrying this woman, has become, by operation of law, liable for her acts; and therefore liable in this action.

The demurrer is overruled.

Young & Green, attorneys for plaintiff.



## \*DEPOSITIONS.

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[Cuyahoga Common Pleas, September Term, 1878.]

MATTER OF THE APPLICATION OF LEOPOLD NUSHULER FOR  
HABEAS CORPUS.

A witness is not excused from giving his deposition under sections 338 and 339 of the code on the ground that he is a resident of the county in which the action is pending, does not intend to depart, is in good health and intends to be present in court upon the trial.—[ED. LAW REP.]

BARBER, J.

This is an application for a writ of habeas corpus to release the said Nushuler from alleged illegal imprisonment. The sheriff's return to the writ shows that he is held by him under a mittimus issued by a justice of the peace. It appears from the mittimus that depositions were being taken before the justice to be used in an action pending in the court of common pleas of this county. That Nushuler, having appeared in obedience to a subpoena, was sworn and put upon examination as a witness and a question put to him which he refused to answer. The only reasons given by him for refusing to answer were that he was a resident of the county in which the action was pending; that he did not intend to depart therefrom; that he was in good health, not infirm, and should be present in court at the trial; and he claimed that under those circumstances he could not be compelled to give his deposition. He was, therefore, committed to the jail of the county in punishment for the contempt, there to remain until he should submit to give his deposition. There is no controversy as to these facts.

The only question is, could Nushuler be compelled, under these circumstances, to give his deposition?

He claims he could not; that a person who resides in the county when the action is pending, cannot be compelled to give his deposition unless there is at least a probability that the deposition so taken can be used upon the trial. The law on that subject is as follows: [Code, sec. 338.] The deposition of a witness may be used only in the following cases:

1. When the witness does not reside in the county where the action is pending \* \* \* or is absent therefrom.

2. When, from age, infirmity or imprisonment the witness is unable to attend court, or is dead

3. When the testimony is required on a motion. \* \* \*

[Sec. 339.] Either party may commence taking testimony by depositions at any time after service on the defendant.

It is claimed in behalf of Nushuler, that section 339, when construed with sec. 338, means that only such depositions may be taken, as there is a *probability*, at least, may be used on the trial;

and as no such probability existed in his case, he could not be compelled to testify.

It is insisted that any other construction would leave the power to take depositions liable to great abuse; a person might be greatly harassed and annoyed by being repeatedly summoned only to vex him; or his deposition might be taken to get from him facts on which to found a suit against himself, or as a *fishing* expedition to ascertain his adversary's evidence. \*The construction  
**250** sought to be given to sections 338 and 339 cannot be sustained either on principle or authority.

The language of the statute is plain and unequivocal. There is no restriction upon the right to take depositions. Any party to an action, at any time after service upon the defendant, may take the deposition of any person competent to testify. This is evident, not only from the language of the law, but also from the fact that power is given to the officer before whom the deposition is being taken to compel the attendance of anybody the party desires subpoenaed, who resides or is found in the county, and to compel them to testify, and on refusal, to commit them to jail until they will. But no power is given to the officer to decide upon the propriety or impropriety of any question asked by either party, or to excuse the witness from answering, except as to such questions as would directly or indirectly criminate him. Such questions the witness need not answer.

All the knowledge that any person may have with respect to controversies is subject to the call of parties to an action in the manner provided by law, and every possible facility is afforded parties for obtaining and preserving their evidence.

Another, and in my opinion an unanswerable objection to the theory of the applicant, is that depositions may be used on the hearing of a motion, or in any other case where the oral examination of the witness is not required. 3 par. sec. 338, S. and C., 1041.

The construction asked for would have the witness to decide whether or not his deposition could be taken, and whether or not he would testify. The fact that the power to take depositions may be abused, if such be the case, would be addressed with much more propriety to the legislature in an application for a modification of the law, than to a court administering it. But the liability to abuse is more imaginary than real. A party who takes a deposition that cannot be used, has to pay the expense of taking it, including the witness fees, and if the power is wantonly exercised to harass a witness, it is within the power of the court, on proper application, to protect him.

The supreme court of Kansas held the same doctrine in a case precisely parallel with this. See 12, Kas. 451.

The petition is dismissed, and the prisoner remanded to the custody of the sheriff.

## LANDLORD AND TENANT.

[Cuyahoga Common Pleas, September Term, 1878.]

†ELIZA H. GREEN V. HENRY WICK.

A tenant may recover money expended in making repairs on the premises by virtue of a contract with the landlord, by the terms of which the landlord was to repay the money, thus expended, at the expiration of the tenant's lease.

McMATH, J., and a jury.

This was an action to recover the sum of \$674.12, money expended by the plaintiff in making additions to a building which she occupied as a tenant by virtue of a contract with her landlord, by the terms of which the landlord was to repay to her the money thus expended at the expiration of the lease. The landlord, Wallace, prior to the expiration of the lease, sold and conveyed the premises in question to the defendant. It was testified by Wallace that this sum of \$674.12 was deducted from the consideration price agreed upon for the premises and retained by the defendant, Wick, the latter saying that he regarded it as an encumbrance upon the property that would have to be paid. No promise in terms was made by the defendant to pay the money deducted to the plaintiff.

Mr. Wick testified that he had no recollection of the talk testified to by Wallace in regard to deducting the money, and made no agreement with Wallace to pay the plaintiff any money.

Upon this point the court charged the jury as follows: "If you come to the conclusion from the weight of the testimony, that at the time of the conveyance of the real estate by F. T. Wallace to Henry Wick, for the consideration of \$33,000, that any portion of the \$33,000 was retained or withheld by Wick from Wallace, to provide against any supposed lien that this plaintiff may have had at the time of the conveyance, and it was talked of, understood and assented to by Wallace that the money was thus retained to secure him against any supposed lien or lien in fact, in favor of this plaintiff—if the testimony satisfies you of that state of facts, the plaintiff is entitled to your verdict in this case. This excludes the idea of an implied promise or agreement to pay. If the matter was talked of, however indefinitely, if it was understood, however remotely, that the money thus to be retained by Wick was to be retained by him to enable him to meet any supposed lien or claim of this plaintiff, Wallace agreeing or assenting to that then, this plaintiff would be entitled to a verdict at your hands for the amount of the money thus retained.

Verdict for the plaintiff.

E. J. Estep for plaintiff.

Judge S. Burke and W. B. Sanders for defendant.

†See 2 Cleveland Reporter, 147.

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**\*JUDGMENT.**

[Cuyahoga Common Pleas, September Term, 1878.]

J. L. HOWER v. MRS. H. M. JONES.

Where a petition for a judgment on a cognovit note does not state facts necessary to give jurisdiction, the judgment will be vacated on motion.

BARBER, J.

This was an application to vacate a judgment taken on a cognovit against the defendant, a married woman, the note having been given to another by whom it was transferred to the plaintiff. The questions made in the case were, (1,) whether the power of attorney was assignable, it in terms authorizing any attorney to appear and confess a judgment in favor of the holder of the note. (2,) whether a married woman has power under the statute to make a cognovit. These questions the court did not pass upon. The petition containing no averments under the statute of the facts necessary to give the court jurisdiction to render a judgment at law, the motion to vacate was granted.

Stone &amp; Hessenmueller for plaintiff.

E. Sowers and C. G. Canfield for motion.

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**MUNICIPAL CORPORATIONS.**

[Cuyahoga Common Pleas, September Term, 1878.]

JOHN CONNER v. THE CITY OF CLEVELAND.

A city is not liable in damages for an injury to a convict in a workhouse, caused by machinery with which he was compelled to work being unsafe.

This was an action to recover damages from the defendant for an injury occasioned to the plaintiff while engaged in working as a convict in the workhouse of the defendant with a machine making brushes. The plaintiff avers that the machinery was unsafe and dangerous, known to be so by the person in charge, that he was compelled to work with the same, and without fault on his part he was injured by the machinery through the negligence of the city.

A demurrer to the petition was sustained, the court holding that the city is not liable in that class of cases.

**\*ATTORNEY AND CLIENT.**

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[Cuyahoga Common Pleas, September Term, 1878.]

**W. F. HINMAN V. MONTAGUE ROGERS ET AL.**

1. An attorney, as between himself and his client, has a lien on the judgment for reasonable fees agreed upon to be paid, and an assignment by such judgment creditor of the judgment to pay a debt due from his wife does not defeat the attorney's lien.
2. An agreement between an attorney and his client to pay the attorney's fees out of the amount collected, but not such as to prevent the parties themselves settling, is not champertous.

**HAMILTON, J.**

This is an action for equitable relief. The plaintiff sets out in the petition that he is the clerk of this court; that at the November term, 1877, of said court, James Crawford, in a certain suit therein pending, in which he was plaintiff and Laura W. Hilliard and Mary H. Sterling were defendants, recovered a judgment against said defendants in the sum of \$150; that afterwards, on the 6th day of February, 1878, said Crawford executed a certain assignment of said judgment to the defendant S. A. Oakes, who, ever since, has remained the assignee thereof, and to whom has been paid the amount of the damages recovered in said action, save and except the sum of \$75.57; that there has been paid, also, in full, all the costs of said action, and that there now remains in the hands of the present plaintiff, Hinman, as such clerk, this sum of \$75.57; that that amount is claimed by said Oakes as assignee of the judgment, and that it is also claimed by Montague Rogers by virtue of a certain lien which he, as attorney of said Crawford, asserts thereon to that amount; that the plaintiff is in doubt as to which of said parties he should pay this claim, and he therefore asks that they may be made parties defendant, and to set up their respective claims, and for an adjudication of the rights of all the parties, and that he may be directed to whom to pay the amount. Oakes sets up the fact that he became the assignee of this judgment in February, 1874, for a valuable consideration, saying that the plaintiff in the original action, Crawford, was indebted to him in a large amount; and that he gave credit for the sum of \$145.00, the judgment being for \$150, in the original action—he gave credit to Crawford for that amount upon his said indebtedness to him. That he had no notice of any claim or lien upon this fund, or upon this judgment, in favor of the attorney Rogers, and that he is therefore entitled to the entire amount of the judgment. Rogers set up the fact that he was such attorney; that his services in that action were worth the sum of \$75, and that it was agreed between him and Crawford that that judgment, to the amount of \$75, at least, should be assigned to him, and he denies that Oakes became the assignee of this judgment for any valuable consideration, or that he was the purchaser of that judgment in any way. He fur-

ther sets up that it was transferred with the design and intent on the part of Crawford to defraud him of his just lien and claim upon that judgment as such attorney. He says that the said Oakes paid no money or any other consideration for said assignment, except he agreed to credit said James Crawford upon an old debt, anything that he might get out of the said judgment. He therefore claims, by virtue of his attorney's lien, this amount that is in controversy.

The question in controversy between these defendants litigating this matter seems to be whether an attorney has any lien upon a judgment procured by him, and how far that judgment is to be protected against a purchaser or assignee of the judgment without notice. It undoubtedly was the old common law doctrine, recognized by the English authorities and by those of many of the states, that an attorney has a lien upon all the papers in his possession belonging to his client, and also a lien upon any judgment which he may recover in favor of his client, for any disbursements or outlays—any expenditures which he may have made in the prosecution of the suit, and for any costs that are properly taxable in the bill of costs paid by the attorney, the English doctrine being, formerly, that he had no lien beyond this—that this lien did not include his professional services in the case. It proceeded upon the theory that such services were merely honorary, and that he was not entitled to compensation—could not, indeed, bring a suit at law for such services. It need scarcely be said that the common practice in this country, universally recognized, is to permit attorneys to recover for such services, and bring and maintain suits for such services; and no distinction in reason ought to exist between an outlay of the attorney by way of expenses in conducting the suit and his professional services. In other words, he ought to have a right of recovery, as well for his labor which he expends, as for the money which he pays out in the prosecution of the suit. I have, therefore, no doubt that it is the generally recognized doctrine in the states of this union, that an attorney, at least between himself and his client, has a lien upon a judgment recovered by him through his services in behalf of his client, for such services. Then, as between this attorney, Mr. Rogers, and his client, Crawford, if the question was between them, I have no doubt that the attorney was entitled to a reasonable compensation for his services, and that he has a lien upon the proceeds of the judgment obtained through such services thus rendered in behalf of his client. Now, is there anything to take this case out of the rule as between the attorney and his client? It is said that this judgment has been assigned in good faith without notice. I may say that in reference to the evidence produced upon this subject, I find, from a fair preponderance of the evidence, that the services  
268 of the attorney were worth in that case, \$75; that being \*the testimony before the court and no evidence being given on the other side to contradict it.

It is further said that there was an arrangement between Crawford and Rogers, at the time of the suit that one-half of the amount recovered was to be the measure of the compensation of the attorney. This is denied by Crawford upon the stand, and consequently denied by Oakes. But whether any such agreement existed there is no controversy—no contradictory evidence of the fact as claimed by the attorney, that his services in the case were worth \$75.

It is said such a contract falls within the inhibition of the law; that it is not permissible to the attorney to make such a contract; that it would be champerty upon the part of the attorney to make such an arrangement, and, therefore, against the rules of the common law, in that particular, and would annul the contract. The 1st Ohio and 13th Ohio are cited in support of that proposition. Suffice it to say, that, in the opinion of the court, this contract, not being one intended or meant, so far as the contract is in evidence before me, to prevent any settlement or adjustment by the parties themselves, in the case, it being a contract simply for the amount of the compensation, it would seem to me, it does not fall within the rule laid down in the cases cited. In any event, whether it does or not, independent of the contract, it is set up in this answer of Rogers, that his services were worth \$75. That is the allegation, without any reference to any contract at all between the parties, and the proof, as I said before, seems to me to sustain that proposition, there being no evidence except that it was worth that sum—\$75; so that it seems to me that the question of whether the contract is tainted by champerty or not is not in this case.

Now, it is laid down as a proposition of law, that a judgment debtor, in order that an assignment shall not prejudice him, before payment by him, shall have notice of such assignment; in other words, if an assignment is made, no notice being brought to him of the fact of such assignment, and he pays the party holding the judgment, it would be a good payment, notwithstanding there has been a previous assignment, but as between the judgment debtor and the assignee of that claim, it is said that the assignee stands in no better position than the judgment creditor would stand—exactly in the same position; in other words, that he stands in the shoes of the judgment creditor, and that all the equities existing between the judgment creditor and the judgment debtor shall be available as between the assignee of the judgment and the judgment debtor. But it is scarcely necessary in this case, in my judgment, to decide that proposition, for in the view which I have taken of this case, it seems to me that Mr. Oakes was not a purchaser for value. It would seem from the evidence, that the claim upon which it is said that this amount of the judgment, \$145, was credited, was a claim of Oakes & Co., against the wife of Crawford. It was not a debt of Crawford to Oakes & Co. at all. It was, in other words, simply in effect a transfer of this judgment by Crawford for the benefit of his wife, to be credited upon a debt of Mrs. Crawford to Oakes & Co.

Now, that is nothing more nor less in effect than a transfer of this claim for the benefit of Mrs. Crawford, without any consideration, so far as the court is able to perceive, without affecting in any way the rights of Oakes & Co. to pursue their claim against the wife of Crawford, no consideration moving between Crawford and his wife by which this was to be effected. This transfer was to be made to Oakes & Co. in settlement of her debt. It therefore seems to me substantially to rest upon the same basis that it would as between Crawford himself, if he were here defending in the place of Oakes, and his attorney, Rogers. Now, as between those parties, it seems to me that it is recognized by the law of the states generally, and though we have no special authoritative decision in this state upon the subject, yet we have the general law that an attorney, as between himself and his client has a lien upon a judgment for the amount of his reasonable fees. That being my view of the case, it is the opinion of the court that Mr. Rogers is entitled to this amount of \$72, and the decree, therefore, will be that the clerk pay to him that amount. If there is any balance it may go to Oakes as the assignee of the judgment.

Henderson & Kline for plaintiff; J. A. Smith for defendant Oakes; W. C. Rogers for defendant Rogers.

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### FALSE IMPRISONMENT.

[Cuyahoga Common Pleas, September Term, 1873.]

MARY M. NICHOLS v. THE L. S. & M. S. RY. CO.

A railway corporation may be held liable on an action for false imprisonment.

This was an action for false imprisonment. A demurrer to the petition raised the question of the liability of a corporation to such action. Demurrer overruled.

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### JUSTICE OF THE PEACE.

[Cuyahoga Common Pleas, September Term, 1878.]

MCCONNELL v. NOLAN.

A justice of the peace has no jurisdiction in action against a married woman to recover for services in selling real estate, the separate property of such married woman.



**JUDGMENT.**

[Hamilton Common Pleas, June Term, 1877]

†JAMES MACK V. GEORGE SCHLOTMAN ET AL.

A judgment against George Schlotman, the name in which he contracted the debt, is a lien on land held by him as Gerhard Schlotman, his true name, as against a buyer without notice.

For opinion in this case see 3 B., 737.

**\*AGENCY—SALE.**

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[Cuyahoga Common Pleas, September Term, 1878.]

FRANK LESLIE V. EVANS, VAN EPPS & CO.

1. Where a written contract by an agent for his principal expressly states that the agent has no authority to make any different contract than that signed, no representation of the agent as to further rights are admissible to alter it.
2. If goods ordered do not comply with the contract, the buyer should use reasonable diligence in finding this out, and should offer to return them and hold them subject to seller's order.
3. In offering to return goods that do not comply with the contract of sale, the offer to return must be unconditional and not coupled with an offer to exchange them for something else, exercising ownership over them.

HAMILTON, J. and a jury.

The following is the charge of the court:  
Gentlemen of the Jury:

This action was brought by Frank Leslie, plaintiff, against the defendant, Evans, VanEpps & Co., partners in business. The action was originally brought upon an account for goods sold and delivered by this plaintiff, as it is alleged, to these defendants, at their instance and request; and for the value thereof, as set forth in the petition, it is claimed that the plaintiff ought to recover.

The defendants answer and admit the partnership, but they deny that these goods were delivered to them as they were stipulated to be delivered; in other words, they set up that there was a special contract entered into between these parties under which these goods should be delivered. They set out that contract in detail in their answer, and they say that this contract, as written, does not, in fact, express the real intent and meaning of the parties; in short, that this contract, that was signed by them, was procured of them by certain fraudulent and false representations of the agent of this plaintiff. This false and fraudulent representation is averred in respect to one clause of the contract, and that clause relates to the exchange of patterns, the contract providing

†Affirmed, 7 Record, 665.

that they could exchange the patterns which should be sent for, for any other patterns which they might see fit to select, upon returning the old patterns.

They further say, that they specially ordered at that time a different class of goods from those that were sent; that they ordered, in short, patterns adapted to fall and winter use, and not summer patterns; that, in fact, summer patterns were sent; that, as soon as they became cognizant of that fact, they immediately notified the plaintiff in this case that the patterns were not such as they contracted for, and were old and worthless patterns, substantially out of date—being summer patterns, and not what they ought to be. They say that they paid \$45 on this contract, at its inception—that is, at the date of the signing of the contract, the 20th of June, 1876, the goods, by the stipulations of the contract, to be sent on or about the 1st of August ensuing, or sooner, if ordered by these defendants. They, therefore, conclude their answer, by asking for a reformation of this contract in that particular, and when thus reformed, they say, it will show that the contract was not complied with, and that, therefore, they are not responsible for these goods; and having paid \$45 in money upon them, and not having accepted the goods, as they say they had a right to decline them, that they are entitled to recover back the sum of \$45, from this plaintiff.

The reply concedes that such a contract was entered into, but it substantially denies all the allegations of the answer, except that this contract was entered into as they set it up

Mr. McFarland: The contract in writing.

The Court: Yes; the contract in writing. The issue, then, is practically changed from an action upon an account to an action upon a contract—the question is, whether such a contract was entered into, and whether they have complied with the contract? The question, as to whether there was any other contract entered into, you need not regard as submitted to you at all, the court having ruled that evidence upon that subject was inadmissible. The question is not, therefore, for your consideration. Whether any fraud was perpetrated in the making of that contract is all out of the case. We will take the contract, then, as it stands—as it was originally signed by these parties, as governing the rights of these parties in this contest.

Now, it is claimed by the plaintiff that he has performed this contract, in all of its particulars, so far as these goods are concerned, at least, that he is entitled to recover.

On the other hand, it is claimed that he has not so performed the stipulations of the contract, by reason of not sending such goods as were ordered, \*and this is the question for your determination, under such rules of law as shall be given you by the court. The contract, its meaning, its construction will be for the court. Therefore, such construction as the court shall place upon the contract itself, you will take as being the contract.

I am asked to give you certain charges in reference to this contract. The fifth proposition is, "The agent of Frank Leslie, who made the contract, had no authority to make any contract other or different than that expressed in the writing signed by the plaintiff and defendant." That charge I give you, it being expressly stipulated in the language of the contract itself that he possessed no further authority in the case. The other charges requested as written are declined, except such portions of them as the court shall see fit to give in its own language. It is said here that this contract expressly stipulates that they shall keep a full and complete assortment of patterns represented in the catalogue issued by the said Frank Leslie, and shall sell the same at not less than the retail price. Considerable controversy has arisen about the introduction of testimony as designating what kind of goods were represented by this first order that is mentioned in the contract, to wit: this three hundred dollar order covering these goods for which suit is now brought. The first stipulation of the contract is "in consideration of the purchase from Frank Leslie of \$300 worth of paper patterns," etc. That is all the description there is about the paper patterns, what they are and what they shall be, until we reach this further clause which relates to the agency that is created between these parties. After selling them these goods they then stipulate that the defendants shall become their agents for the sale of their goods during the year—one year from the date of this contract, the 20th of June, 1876, but in stipulating how they shall do the business of this agency it is said they shall keep a full and complete assortment of the patterns represented by the catalogue issued by the said Frank Leslie. It seems that this catalogue was issued from time to time, including the patterns which were manufactured by the house of this plaintiff.

Now, I am inclined to think, though the testimony was admitted, not without some doubt on my part as to its admissibility, that it is admissible, upon the ground that it threw light upon the terms of this contract; in other words, that it might be proved what was a compliance with its terms—that is to say, it might be a subject of parol proof to determine what was a full and complete assortment of the patterns represented in the catalogue. That testimony was admitted, not for the purpose of varying this contract, and I say to you now that it should have no such effect, but it is stipulated here that from time to time, these defendants may order such goods as they shall need, keeping within the rule that it shall be an assortment of the goods manufactured at this house and represented by its catalogue. If the defendants themselves had no discretion as to what goods they were to order, as to how many and what different kinds, but it was simply to be a full assortment of the goods, then no directions should ever be needed, from these defendants to the plaintiff as to the kind of goods they wanted, except to write for the quantity of the goods, and the catalogue would be the rule to determine that which would be a full assortment.

Now, in my judgment, the character of the order, under such a rule, must depend very materially upon the season in which the order is made; in other words, while it may be a full assortment, you may have a very small quantity of summer goods, and you may have a large assortment of fall and winter goods.

It seems to the court, that it would be competent for these parties to stipulate what amount of the different kinds of goods, within this catalogue, they should have—how many of this kind and how many of the other—keeping within the rule of the assortment. That they were bound to do by the terms of the contract. That, it seems to me, they had a right to do.

Now, as bearing upon that question this testimony was admitted, and for that purpose only, not to change or alter the terms of the contract itself, but simply as indicating, in compliance with the contract, what class of goods, including an assortment of them all, how many and which kind they wanted. It does not seem to me, there is anything in this contract that would preclude them from making such an arrangement with this plaintiff, and still be within the letter of the contract.

Now, I have no doubt, that the defendants, during the period of this agency, during the year, were bound to keep this assortment up, as represented by these catalogues from time to time, as they should issue.

I say to you, further, that if they contracted and sent, sometime in June or July, without any instructions following it, other than the contract itself, then it would be competent for the plaintiff to send a full assortment; but as to the different amounts of this, that, or the other class of goods, it would be entirely competent, in my judgment, for these defendants to indicate, by an arrangement with the party, or by their order, what they were to have. It must be an assortment; and it would be an assortment of such goods as were manufactured at that time, and as were represented by the catalogue, so far as they had been published; for I do not understand this answer is broad enough to include any fraud, by way of misrepresentations, inducing them to believe that they were going to get some other class of goods than what they did get; that is to say, if there were any false and fraudulent representations inducing them into the contract for fall and winter patterns, then there is no case made in this answer based upon any such ground. There can be no recovery for such fraud. It is only competent to be considered in determining the question whether the terms of the contract have been complied with. It is not a case now for false and fraudulent representations by which they were induced to order goods—fall and winter goods. Suppose they were getting fall and winter goods when they were not to. That is not it. That proof is only offered for the purpose of showing what the contract was, and can, therefore, only be pertinent to the first defense interposed, to wit that they did not get the goods that were ordered and contracted to be delivered by the parties.

Now, if you shall find that in accordance with this contract they did send these goods; did send an assortment, and such an assortment, substantially as was agreed upon or stipulated for, then they are entitled to recover the full amount of their claim. If they did not, if, in substance, they were not the goods that were ordered, keeping in view the contract itself, and the existence of this catalogue as published at the time—if they did not send the goods that were stipulated for, or, in other words, ordered by this verbal order to this agent, and the plaintiff did not comply with it, the defendants had a right to decline to receive the goods, but they must act promptly when they discover that they do not comply with it. They must offer to return them and say to them that they are subject to their order—\*be ready and willing to return 275 them. They cannot retain the proceeds in their own keeping and still ask to have the contract nullified. Did they do that? If they did, and the goods did not fulfill the terms of the contract as I have explained to you, then they are not bound to pay for these goods, because there has not been a compliance with the contract on the part of the plaintiff. Now, that is a question that is left to you to determine. If you find for the plaintiff; upon that issue, that the contract was complied with, that the plaintiff did furnish the goods that were ordered, and in determining what were ordered you will bear in mind what has been said upon this contract, and as to this catalogue, and the arrangement between the parties, if you find that the plaintiff complied with the order, then he is entitled to recover, and your verdict should be general, assessing the damages at so much.

If you find that there has not been a compliance with this contract in these regards, and that the defendants, as soon as they discovered that they were not in accordance with the contract, and that should be qualified by saying they should use reasonable diligence in making the discovery; and if they got the goods and kept them some time, sold a portion of them, these facts are to be considered by you, and they should act with reasonable promptness; cannot keep the goods and sell them from time to time with the knowledge of the facts. If you find that they did so—offered to make return upon discovering that they were not in compliance with the contract, then there can be no recovery under this contract, and the defendants may recover back what they have paid for the goods. If you find these facts in favor of the defendants, it will be your duty to find for the defendants, assessing their damages at so much, which would be the amount of the money they have paid with interest.

Mr. McFarland: I ask the court to charge the jury that this offer to return the goods, after discovery that they are in accordance with the order, must be an unconditional offer, and not coupled with an offer to exchange for the Ladies' Gazette or Frank Leslie's Journal.

The Court: I so charge. It must be an unconditional offer to

return. A simple repudiation of the goods, as not complying with the contract, and keeping possession of them and exercising ownership over them, offering to make exchanges would not answer the purpose at all.

Mr. Eddy: I do not know that this letter should go to the jury, because certain parts of it are excluded; and I do not know whether the court would give the jury any further instructions as to what is a fair offer to return, and whether the language used here—

The Court (interrupting:) It is unnecessary to read the language. The letter itself cannot go to the jury because a portion of it is improper.

W. C. McFarland for plaintiff; V. P. Kline and S. M. Eddy for defendants.

### AGENCY—EVIDENCE.

[Cuyahoga Common Pleas, May Term, 1878.]

#### GEORGE GILBERT V. THE FIRST PRESBYTERIAN CHURCH OF NOTTINGHAM.

Parol testimony may be introduced to show whether an order, not negotiable, was signed by the drawer as principal or as agent.

HAMILTON, J.

This is an action brought upon an order which reads as follows: "Collamer, March 8, 1871. James Camp, Treasurer of the Board of Trustees of the First Presbyterian Church of Nottingham: "Dear Sir—Please pay George Gilbert \$150 and charge the same to my account and greatly oblige. F. McGinnis." It is endorsed: "The within order is accepted. James Camp, Treasurer of the Board of Trustees." The defendant is averred to be a religious society duly incorporated under the laws of Ohio.

It will be noticed that the order is not a negotiable instrument. A demurrer is interposed to the petition. It is claimed that the order is not made upon the church, nor accepted by the church, but is an order upon James Camp; that the words "treasurer of the board of trustees of the Presbyterian church of Nottingham, in the body of the order and in this acceptance are merely *descriptio personae* and therefore not the act of the church.

I have been unable to find any precedents, especially upon a case of this character. The general doctrine of the law in this state, as I understand it, is that in the case of a negotiable instrument, parol testimony cannot be introduced to show the capacity in which the instrument was signed, i. e., where the instrument itself does not disclose the real relations of the parties. But I understand it to be the rule that in cases of a mere contract, where a party is named in the instrument itself and the word agent or other descriptive

word occurs, testimony may be given. This is not a negotiable instrument and it therefore falls within the latter rule. Judge Swan says: "If from the mode in which the subject matter of the instrument is set forth in the body of it, or if from the description therein of the principal or agent, or if, from the terms of the instrument, or any other matter therein it appears that the parties intended it as the promise of the principal by and through the agent, and the name of the principal appears on the instrument it is held to be the promise of the principal, however informally signed by the agent and however informal the promise of the principal, by and through the agent, may be expressed. All, indeed, that seems necessary, is, that the name of the principal should appear upon the face of the instrument, and that the instrument itself should indicate a ministerial act upon the part of the agent."

Now, there is no express declaration that this man Camp was acting as the agent of anybody, but he is described as the treasurer of the board of trustees of the church. While, perhaps, it might be well to aver distinctly that he was acting for and in behalf of the church, and signed this instrument while thus acting, yet a general assessment that the thing was done by the principal himself, though it appears upon the face of the instrument to be done through an agent, is, perhaps, sufficient; and I am not prepared to say that this petition is not full enough. It will be a subject for the testimony to disclose as to whether the order was accepted by the church through its agent acting as such. The demurrer is overruled.

Mix, Noble & White for plaintiff; Ingersoll & Williamson for defendant.

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**\*DOWER—APPEAL.**

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[Guernsey District Court, September Term, 1878]

McIlvaine, Frazier, Marsh, Okey and Patrick, JJ.

CATHARINE J. ARNEEL V. ANNA C. KNOX ET AL.

A petition for dower under the statute in the common pleas court, is not a civil action and not appealable.

Catharine J. Arneel filed her petition in the court of common pleas for dower under the statute. After decree in the common pleas, all the steps necessary to perfect an appeal from that court to the district court were duly taken. On motion in the district court to dismiss the appeal, Marsh held that the same was not appealable, not being a civil action and the dower statute not providing for an appeal. Motion sustained. Frazier and Patrick concurred. McIlvaine and Okey not sitting.

White & Campbell for motion; Skinner & Steele contra.

**CURTESY.**

[Guernsey District Court, September Term, 1878.]

McIlvaine, Frazier, Marsh, Okey and Patrick, JJ.

**GEORGE NEFF V. NANCY TURKLE ET AL.**

1. On divorce for the aggression of the husband, and restoration to the wife of all her lands, with power to acquire, hold, manage and dispose of, etc., the husband has no estate by the curtesy or otherwise.
2. In an action to foreclose a mortgage made by a divorced wife, the title will be quieted against the claims of the ex-husband for curtesy, on a prayer by both mortgagor and mortgagee.

Nancy Turkle filed her petition in the common pleas against her husband, John W. Turkle, for alimony. Decree was in her favor and appeal.

The district court found the husband guilty of adultery and extreme cruelty, and that in consequence she had left him. That she was the owner in her own right of a large amount of real property and it decreed to her a restoration of all her lands, tenements and hereditaments, and vested in her the right and power to acquire, hold, manage and dispose of property, money, and choses in action; to sue and be sued, etc., in the language of the statute. She afterward executed a mortgage on this land to Neff, who filed his petition to foreclose, and averred that the husband was giving out in speeches that if he survived her he would have an estate by the curtesy, thereby casting a cloud on the title, and impairing his security. The wife, by cross petition, alleged the same, and both prayed that her title might be quieted. The husband answered, denying her right alone to mortgage, and claiming his right to curtesy, etc.

McIlvaine held that husband had no estate or interest in the land, present or contingent, by the curtesy or otherwise, and that the wife had lawful right to sell and convey the same free from any claim of curtesy.

Frazier and Patrick concurred. Marsh and Okey, having been of counsel, did not sit.

White & Campbell for plaintiff Nancy Turkle; Taylor & Anderson contra.

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**MANDAMUS—APPEAL BONDS.**

[Hamilton District Court, October Term, 1878.]

**STATE OF OHIO, EX REL., R. L. CRIGLER V. LEOPOLD BLOCK, J. P.**

Where a justice improperly refused to allow a party to execute an appeal bond, the court can not after the time in which it can be done has passed, compel the justice by mandamus, to allow it.

For opinion in this case see 3 B., 792.



**\*STREET ASSESSMENTS—FRANCHISES—LIENS. 304**

[Cuyahoga Common Pleas, September Term, 1878.]

**CITY OF CLEVELAND V. THE CLEVELAND AND NEWBURGH R. R. CO.**

1. Where a street railway is bound to pave the track between the rails when required by the city, and the city by ordinance levies an assessment on the track and franchises of such railway for the cost of such work, such assessment is not for the mere collection of a contract debt.
2. The franchises and tracks of a street railway are land within the meaning of the assessment laws, and subject to the same burden as non-abutting land.
3. An assessment made and levied on the tracks and franchises of a street railway creates a lien on the same from the date of levying the assessment.

DEMURRER to the petition.

BARBER, J.

This case is before the court on demurrer of Joseph Stanley, to the petition. The action is brought to recover from the defendant, the Cleveland & Newburgh Railroad Company, a judgment for a tax which the plaintiff says is due to it.

The facts on which the action is based, as appears by the petition, are as follows: This company was the owner of a railroad, the southern end of which occupied Broadway, one of the streets of the city, between Union and Miles streets, and the northern end of which occupied Kinsman street, between Wilson avenue and the dummy station, so called. The track of the railroad on each of these streets was laid in the middle of the street, and was used as a street railroad, and occupied the streets of the city under the general provisions of statute, making it obligatory upon the company to pave the track between the rails with boulders or Nicholson pavement, when required by the city. On Dec. 21, 1874, the city, by ordinance, provided for the paving of Broadway with Nicholson pavement, required this railroad company to pave between the rails of their track on Broadway, from Union to Miles street, and provided for levying the costs and expense of the improvement, except so much as might be chargeable to this railroad company, upon all the lots or parcels of land benefited thereby. The work of the improvement was done in 1875. When the city was about to commence the work of the improvement, they were requested by the railroad company, to do the work which the company was required by law and the ordinance to do. This the city did at the cost of \$8,415.14. The railroad company failed to pay this cost to the city, and on the 5th day of November, 1877, an ordinance was passed levying a special tax on all the property of the railroad company, real and personal, to pay the same.

For a second cause of action, the plaintiff sets up the same state of facts, substantially, as to the paving of the street between the rails of this company's track on Kinsman street, between Wil-

son avenue and the dummy station, so called. The ordinance to improve the street was passed May 12, 1874; the work was done at a cost and expense of \$3,008.81, and on the 11th day of May, 1878, the ordinance was passed levying the tax. The bonds of the city were  
305 issued to pay the expense incurred in making these \*improvements; and to pay these bonds, interest and principal, these levies were made, and the plaintiff claims a lien on the franchise and track of this railroad for the payment of this tax. The petition avers that defendant Joseph Stanley, claims some interest in this property as purchaser. Mr. Stanley demurs to the petition, on the ground that it does not state facts sufficient to constitute a cause of action against him.

The question raised by these pleadings, is, has the city by these proceedings, obtained a lien on the franchise and track of this railroad company for the payment of this tax. Three points are made by the defendant in his brief:

1. That the alleged indebtedness is a mere contract debt.
2. No authority of law has ever been conferred upon the city of Cleveland to levy a tax upon the property of a railroad company to collect such a claim.
3. The ordinances levying the assessments create no lien.

I think the debt is more than a mere contract debt. The law authorizes the city to improve the street in the manner in which these improvements were made; the railroad track and between the rails is part of the street, and is included in that authority. The street could not be improved without it, and it certainly could not be the intent of the law that the city should wait until the railroad company should, on its request, pave its track, or until it could be compelled to do so. The plain purport of the law is, that the city may do the work and require the company to pay for it.

As to the second point made by the defense, that the city has no authority to levy such a tax on this property—if the franchises of this company and its track are land and subject to taxation the city has such authority—if not, no such authority exists. In my opinion they are *land*, and are subject to taxation for the purpose for which these taxes are levied.

In the case of the Northern Indiana R. R. Co. v. Connelly, 10 Ohio St., 160, the court holds that a railroad track is, under the laws of Ohio, taxable as real estate, and is, therefore, properly described as land, citing as authority, "Providence & Worcester R. R. Co., v. Wright, 5 R. I. Rep., 459, in which it was held that the rails, sleepers, bridges, etc., of a railroad company, together with their easement in the lands within the located limits of the road, are real estate, and as such liable to taxation in the town where situated.

In New Haven v. Fairhave, 38 Conn., the same doctrine is applied to a horse railroad in the streets of a municipal corporation.

The authority of the case cited in 10 O. St., 160, extends to power of a municipal corporation to levy a special assessment for

street improvement purposes upon all the interest a railroad company has in a lot of land abutting on the street improved and upon the track of the company thereon, and that such property is properly described as a lot, or land, and I think special authority is given the city to levy a special assessment for street purposes, upon the franchises and track of a railroad company which occupies a street within the corporate limits, by section 579 of the municipal code, which reads as follows: "If in the opinion of the council or board of improvements, the same would be equitable, a proportion of the cost of making the improvement may be assessed, as herein provided, upon such other lots or lands, within the corporation, not bounding or abutting on the improvement, as will, in the opinion of the council or board, be specially accommodated and benefited thereby. \* \*". This property, then, is land not bounding or abutting on the improvement, and having requested the city to make the improvement for them, the railroad company is estopped from claiming its land is not specially benefited or accommodated thereby. The defendant Stanley claims under the railroad company as purchaser, and is also estopped in the same manner.

As to the third proposition, that the ordinances created no lien, no objection is made to their regularity in all respects, and under the provisions of section 545, a lien is created from the date of the assessment.

The demurrer must be overruled.

Heisley, Weh & Wallace for plaintiff; John Coon and F. J. Wing for defendant, Joseph Stanley.

### DEATH BY WRONGFUL ACT.

[Fulton Common Pleas, October Term, 1878.]

FRANCES JOSWOYAK, ADM'X., ETC., V. THE L. S. & M. S. RY. CO'

1. Where a workman undertook to board a moving train, the order of the conductor of the train that all should get on board will not excuse the negligence of the workman.
2. An employee is chargeable with that degree of intelligence which fits him for his employment, and he must exercise ordinary care.
3. A superior of an employee has no authority to order the latter to commit an act the doing of which would naturally or necessarily be attended with great danger to life or limb, and obedience to such order under such circumstances would be such negligence as would defeat the latter's recovery.

\*OWENS, J. and Jury.

Gentlemen: Of the subject matters averred in the plaintiff's petition the only fact denied by the defendant, and hence the only fact which the plaintiff is called upon to prove, is that the death of Andrew Joswoyak, the husband and intestate of the plaintiff, was caused by the negligence of the defendant. To entitle the plaintiff to recover in this action, she is required to prove this fact by a fair

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preponderance of the evidence in the case. The negligence imputed to the defendant is charged to be, first, the wrongful and negligent construction of the platform at the woodshed where the plaintiff's intestate was killed, whereby the lives and limbs of laborers employed in loading wood upon the train at such woodshed were exposed to great and unnecessary danger, as defendant well knew, and of which deceased was ignorant; and second, that at the time the deceased was in obedience to the orders of the conductor of the gravel train, upon which he was employed loading wood upon the engine of such train, the conductor of said train so wrongfully, negligently, and in violation of his duty, caused such train to start as that the deceased in the attempt to board such train, while in the line of his duty, and without his fault, was killed.

Unless the plaintiff by the evidence in the case has traced the death of the deceased to the neglect of the defendant in one or both of these respects, she cannot recover. The term negligence scarcely needs a definition at my hands, but substantially, it means carelessness. Carelessness implies, of course, the absence or omission of care. The negligence which creates a liability for an injury caused thereby, and which must be shown to charge the defendant in this action, is the absence or omission of ordinary care. Now, ordinary care, as you are to consider that term in this case, is that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged, to a safe and successful termination, having due regard to the rights of others and the object to be accomplished. It is, in fact, such care as ordinarily careful and prudent persons are accustomed to exercise under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous.

Now, if the defendant, by the omission of such care as I have defined to you, produced the death of the deceased without fault or neglect on his part, the plaintiff is entitled to your verdict.

When the deceased engaged in the service of the defendant and while so engaged, as an implied part of the contract and terms of service he took upon himself, as between himself and the company, the natural and ordinary risks and perils incident to such employment; but the company was under an implied contract with the deceased to adopt and maintain suitable machinery and means with which to carry on the business in which the services of the deceased were required as well as to see to it that such skill and knowledge were exercised by the defendant's servants in charge of such machinery, as were adequate to its safe and secure operation; and it was the duty of the defendant by its servants superior in authority to the deceased, to advise him of all peculiar risks or dangers, not obvious or apparent to one of ordinary care and caution, which attend or incident to the service of the deceased which the

defendant had or ought to have had knowledge of; and if the company failed in the performance of this duty and by reason thereof the deceased was killed while in the exercise of his duty and in the use of due care, the defendant is liable.

As I have already advised you, the plaintiff is seeking to recover against the defendant upon the grounds of the defendant's negligence. It is not enough that negligence be shown on the part of the defendant, unless it also appear that the deceased did not by his own negligence contribute to his death; for if it appear by the evidence that the deceased by his own negligence contributed at all to his own death, although you should find the defendant guilty of ordinary negligence, that is, of the omission of ordinary care and prudence, the plaintiff is not entitled to recover against the defendant. Such negligence on the part of the deceased would be what the law terms contributory negligence which would be fatal to the plaintiff's recovery. And here I am asked to give a reason for the law. My province is to give the law in charge to you ordinarily and not the reasons. There is a very good reason for this law and I will give it to you because I am requested to: The law will not apportion damages between parties where one by his own wrong has contributed to his loss, although the other by his fault has in some part caused the injury. The liability of the company was conditioned upon the exercise of reasonable and proper care upon the part of the plaintiff's intestate.

Gentlemen, whenever I speak of the defendant, its acts and conduct, I allude to it, of course, as it acts and speaks by its agents and servants.

The defendant is a corporation, an invisible, intangible being, having no existence as a substantial thing except in the imaginations of men and in contemplation of law. It acts and can act only by its agents, officers and servants; so whenever a servant of the company is acting in the line of his service there is the company, in his person, doing the things which the servant is doing, so that the negligence or diligence of its servants is the negligence or diligence of the company, the defendant.

In determining the question of the negligence of the defendant or of the deceased or of both, you will take into account all the circumstances surrounding the transactions at the time of the death complained of—whether the starting of that train was attended by such usual and ordinary circumstances as the deceased was bound, in the use of ordinary care, to know and provide against, or whether the circumstances were extraordinary and the dangers unusual. If the death of the deceased resulted from such risk, dangers and exposure as were usual and ordinarily incident to his service, and he voluntarily encountered such risks, danger and exposure he incurred for himself the penalty of his negligence or hardihood and he has paid that penalty with his life, and the law is powerless to administer redress.

If it be true that there is a speed which a gravel train may at-

tain when it is no longer safe for the workman to attempt to get onto the train then it is for the jury to ascertain from the testimony what that speed is, and if you find from the evidence that the plaintiff's intestate attempted to get onto that train while in motion, after it had attained that degree of speed, then that would be negligence on his part that would preclude his recovery, and the order of the conductor given before the train started for all to get aboard, will not authorize or excuse that kind of negligence on his part.

**307** \*If the jury find from the testimony, that the negligence of the engineer, Watson, in starting the train with an unusual force of steam caused the injury of the plaintiff's intestate, then that is the negligence of a fellow servant, and the plaintiff's intestate in entering into the employ of the company took upon himself the hazard from the consequence of any negligence of that kind, and for that the company is not responsible to his administratrix.

If, however, you find the conductor to be guilty of negligence which contributed to the death of the deceased you are not called upon to acquit the defendant, for the reason simply that the engineer contributed by his negligence to such death in starting such train.

If the attempt of the deceased to board that train under the then existing circumstances was attended with such danger to his life or limbs as was obvious to a person of ordinary caution and prudence, it is not enough to charge the defendant with his death to say that his conductor ordered him to board the train notwithstanding the danger. The conductor, although superior in authority to the deceased, had no authority to order the deceased to commit an act the doing of which would obviously, naturally or necessarily be attended with danger to life or limbs; and obedience to such order by the deceased under such circumstances would be such negligence as would defeat the plaintiff's recovery; yet the fact of such order or command is properly addressed to your consideration in determining the degree of care or intelligence which characterized the conduct of the deceased at the time of the injury complained of, and as one of the circumstances surrounding the transaction or throwing light upon it.

Now, gentlemen, if, after a full consideration of all the facts and circumstances in this case, you find that the plaintiff has failed to sustain the averments of the petition by a fair preponderance of the evidence in the case, you will find the defendant not guilty. If, however, after a full, fair and impartial consideration of the case, with an honest purpose to ascertain and declare the truth, without sympathy on the one hand or prejudice on the other, you find the fair preponderance of the evidence to be with the plaintiff, you will, by your verdict, find for the plaintiff, and assess the damages which you find her to be entitled to recover by the following rules:

This action is for the benefit of the widow of the deceased, and for her exclusive benefit, and you will give such damages as

you will deem fair and just with reference solely to the pecuniary injury resulting from such death to the widow of the deceased. The law restricts the damages recoverable in such action as this to an amount which will fairly compensate the widow for her loss in a strictly pecuniary sense by the death of the deceased; or, in other words, that nothing can be allowed for in damages, which has not a definite pecuniary value. The sufferings of the deceased person from the injury cannot be taken into account; nor can you take into account the grief and distress of his widow, nor yet her loss of his society, except so far as that implies the loss of valuable service. You may take into account any reasonable expectation which the widow of the deceased had of a pecuniary advantage from the continuance of his life, such as his legal obligation to provide a maintenance and support for her. You may take into account also the probable continuance of his life and consequent probable duration of such pecuniary advantage to her. You are not confined to a cold-blooded, mathematical calculation of the injury sustained by the widow from the death of the husband. You are to give what you deem to be a fair and just compensation having reference to the pecuniary loss resulting from his death, to his age, his ability, and his disposition to support her for whose benefit this action is prosecuted.

Now, gentlemen, this is what I had intended to say when I began the preparation of my instructions to you. At one time I had thought to allude to another subject. Then I had determined in my mind to withhold any such view. But, in view of much that has been said in argument in this case, I bow to the impulse of the moment and remind you that, upon being impaneled for the trial of this case, you took an oath that you would well and truly try the issues joined between the parties and render a true verdict according to the evidence in the case. Now, the sanction of that oath must preside over your deliberations in your jury room, and by it you must deliver your verdict. It appears that one party to this case is poor, and the other is a corporation, and it is said, rich and powerful. Now, it is the pride and boast of our law that all parties are equal before it; and speaking for myself, I would be ashamed to preside in a court where the rights of parties, no matter what their position or condition might be, were the mere toys or playthings of the caprice, the prejudice or the passions of judge or jury sworn to a just administration of the law. So I do not expect, gentlemen, that the verdict delivered in this case is to reflect simply your prejudice or passion. Nor are you to yield to another sentiment, as weak and as dangerous as that of prejudice, and withhold a verdict from this plaintiff to which you believe her justly entitled, because of a cowardly fear that some lunatic may say that your verdict was extorted from your sympathies or born of your prejudices rather than an expression of your honest judgment. In fact, you are to exclude utterly from your consideration, all outside matters, and test the case by its own merits—utterly exclude all feel-

ing of sympathy for this plaintiff or prejudice against the defendant, and say what are the cold facts of this case. Determine it by your verdict as if it were a case between two of your neighbors who stood in all things equal before you. There is no other way in which you can respond to that oath to well and truly try this case and deliver a true verdict according to the evidence.

Now, when you retire to your jury room, you will appoint one of your number foreman, and when you have determined the issues in this case, if you find for the plaintiff, you will say so by your verdict, and in that insert the amount to which you find her fairly entitled. If you find the plaintiff has failed to maintain the issue on her part by a fair preponderance of the evidence in the case, say by your verdict you find the defendant not guilty. In either case your foreman will sign the verdict.

Mr. Scribner: There is one thing—I am not sure whether it was stated in the connection I desire it; I think it was not—it is, that in considering the question of contributory negligence, the jury are to consider the circumstances under which the deceased was placed, and also the usual custom and habit of men in similar employment under like circumstances.

The Court: I have given that in a general proposition as to what is negligence and ordinary care—perhaps not in that connection—involving the question of contributory negligence.

In determining the question of negligence of the defendant or of the deceased, or both, you will take into account all the circumstances surrounding the transaction at the time of the death complained of—whether the starting of that train was attended by such usual and ordinary circumstances as the deceased was bound, in 308 use \*of ordinary care, to know and provide against, or whether the circumstances were extraordinary, dangerous and unusual. You are to consider the nature of the employment of the deceased, the nature of the duties required of him, the degree of intelligence which he possessed, and he is chargeable with that degree of intelligence which fits him reasonably for that service.

Mr. Goodwin: And reasonably to take care of himself.

The Court: In determining whether deceased was guilty of negligence which contributed to his death, you are to put yourselves as nearly as possible in his place and determine from all the circumstances surrounding him at the time whether he was in the exercise of that ordinary care which the law required of him, because that is all the law did require of him—ordinary care in view of all the circumstances by which he was surrounded, and in the light of those determine the question.

W. C. Kelly and Chas. H. Scribner for plaintiff; Amos Hill and Homer B. Goodwin for defendant.



**\*VENDOR AND PURCHASER.**

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[Cuyahoga Common Pleas, November Term, 1878.]

JOHN JACOB ZELLER V. JOHN MARQUARDT ET AL.

A person in possession under a contract of purchase is not bound to take notice of a mortgage which was given and placed on record after execution of the contract of purchase.

CADWELL, J.

There are two demurrers in this case; one by the Society for Savings, a defendant, to the answer of the defendant Baining to the cross-petition of the Loan Association; the other by the plaintiff to the amended answer of John Baining.

The petition was filed by John Jacob Zeller against John Marquardt, his wife, the Society for Savings, the People's Savings and Loan Association, etc. The petition sets forth that on the 10th day of June, 1872, Marquardt executed a note to the plaintiff for \$1,100, and also executed a mortgage to secure the payment of that note. The cross-petition of the Loan Association sets forth that on the 23d day of May, 1872, Marquardt executed his note to the People's Savings and Loan Association for \$1,600, and executed a mortgage at the same time, upon the same premises, to secure the payment of that note.

Baining, in his answer to the cross-petition of the Loan Association, and also in his answer to the plaintiff's petition sets forth that on the 1st day of May, 1872, prior to the time of the execution of either of the notes and mortgages set forth in the plaintiff's petition or in the cross-petition and answer of the Loan Association, he purchased of John Marquardt the premises in controversy, under a written contract, by which he was to pay \$500 cash in hand and the balance in installments of \$1,125 each, from the 1st day of May, 1872, until the whole amount \$5,000, was paid; that he immediately took possession of the premises, and has remained in possession ever since, and that when these several payments became due, he paid them, by an arrangement between himself and Marquardt, in work and labor; that he had paid in full for the premises without any knowledge whatever of these mortgages, and he avers that the plaintiff as well as the Society for Savings, knew that he was in possession and occupancy of the premises. He says that after he had paid in full, he demanded a conveyance of the premises from Marquardt, and tendered him a deed properly filled out for him to execute, so as to convey the premises in accordance with the terms of the written contract of purchase.

This presents a question which to me, so far as my recollection serves me, is new. But the same question was presented upon a demurrer at a former term of this court to Judge Hamilton, and

he sustained the demurrer, holding that the person in possession under a contract of purchase, was bound to take notice of a mortgage which was given and placed on record after the execution of the contract of purchase. Judge Hamilton says, however, that he made no particular examination of the authorities upon this question. It was substantially an *ex parte* controversy over the demurrer.

Afterwards the question arose in another case, when Judge Barber was holding the motion and demurrer docket, and he, after a full consideration of all the authorities, and consultation, perhaps, with one other judge of this court, decided the other way, and held that the demurrer was not well taken, but that the party  
 313 holding \*the mortgage was under obligation to give to the purchaser under the contract, and who was in actual possession, notice of his claim as a mortgagee, and that the purchaser, having paid without notice in fact of the mortgage, was entitled to be protected.

Afterwards the question came up again in this very case before Judge Hamilton, and he examined into it more fully. He did not pass upon these demurrers now before me; but he says the more he has examined the question, the more he is satisfied he was right in the first place; and Judge Barber is satisfied he was right. After consultation with them and with one other judge of the court, we have come to this conclusion: that it makes very little difference which way these demurrers are decided; but, as Judge Barber's decision is the latest one on the subject, we conclude to follow that. The case will go to the district court, and probably to the supreme court, before the question is determined. But we leave the matter standing in that way, overruling the demurrers. It is a question, upon which judges are not all agreed, evidently.

## COVENANTS OF TITLE.

[Cuyahoga Common Pleas, November Term, 1878.]

ALBERT W. ECKHARDT v. WILLIAM NERACHER.

In an action for a breach of warranty of land sold by defendant to plaintiff, to which defendant answers, setting up no defense whatever, no counter-claim, no set-off, such answer is of no avail and a demurrer thereto will be sustained.

Plaintiff purchased of defendant a certain lot of land for \$2,400 agreeing, as part of the purchase price, to pay a mortgage of \$400 which existed upon the lot, and received from the defendant a deed of general warranty, containing a covenant that the land was free from all incumbrance, whereas, in truth, there was another mortgage upon it to the extent of \$2,000, which was a valid and subsisting lien at the time of the execution of the deed. This latter mortgage was foreclosed and the property sold.

Defendant admits the execution of the deed, that it contained this covenant against incumbrance, that the covenant was broken, that the \$2,000 mortgage was a subsisting lien upon the land, and that that mortgage had been foreclosed and the land sold. He further says that this mortgage covered also another lot of land, and that plaintiff set up in that foreclosure suit, this mortgage of \$400, and that he allowed the land to be sold, procuring another man to bid in both lots at a very cheap rate, and then had the deed made back to him—he was never, in fact, turned out of possession.

The court, (Caldwell, J.,) in deciding the case, said:

This answer is put to a very poor purpose. It sets up no defense whatever, no counterclaim, no set-off—in fact, it has not the semblance of an answer, except in so far as it says it is an answer—a fiat answer, I suppose, which this court does not recognize. The demurrer is sustained.

### VENDOR AND PURCHASER.

[Cuyahoga Common Pleas, November Term, 1878.]

† THE MISSOURI RIVER, FT. SCOTT & GULF R. R. CO. V. ZENAS KING.

1. In order to make a good plea of the statute of limitations of a foreign state, the statute itself should be set forth, so as to enable the court to determine whether the allegations of the answer or plea are borne out by the language of the statute itself.
2. A provision in a contract for the sale of lands which provides that the contract shall become null and void on default of installments of payment or other conditions is not exclusive and does not prevent judgment being taken for overdue installments.

CALDWELL, J.

This suit is brought to recover installments due upon a large number of land contracts. The petition states that the plaintiff agreed to sell several parcels of land, amounting to a great many thousand acres, and that the defendant agreed to pay certain prices in installments.

The first defense is in this form: "That the said contracts, each and all, mentioned in the petition, relate to lands situated in the state of Kansas, were made, executed and delivered in the state of Kansas, and were to be performed there; that by the statute laws of Kansas, actions, upon contracts of the nature of the contracts set up in the petition herein can only be brought within the period of five years after the cause of action shall have accrued; that the several amounts due upon each and all of said contracts were payable in installments, as appears by the exhibits to said petition, and that more than five years had elapsed at the date of the filing of the petition herein, since the causes of action accrued

† Affirmed by the District Court, 6 Bull., 213.

upon each and every installment due and payable on said contracts except the last installment in and upon each contract; wherefore defendant says that plaintiff's right of action and recovery on each and every of said contracts, except as to the last installment due on each, is barred, and no action can be maintained thereon."

A demurrer is interposed to this defense. We think the demurrer is well taken. We are of opinion that the same rule prevails now that prevailed upon the adoption of the code: That in order to make a good plea of the statute of limitations of a foreign state, the statute itself should be set forth. Such is a decision in Wright's Reports; and, so far as we know or can ascertain, it has always been followed in this state. We believe that there has been a case decided, which is not yet reported, which covers the same question; that a plea of the statute of limitations of a foreign state must fully set forth the statute so as to enable the court to determine whether the allegations of the answer or plea are borne out by the language of the statute itself.

But there is another fatal defect to this defense: There is nothing to show that the defendant was a resident of Kansas. The statute of limitations provides: "Where the cause of action has arisen in another state or country between nonresidents of this state, and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state."

Now, it is not shown in this answer that King was a nonresident of this state at the time that the causes of action arose. We think that is a fatal defect.

The second defense is: "By the express terms of each and every of said contracts it is provided that in case the second party (the defendant herein) shall fail to make the payments aforesaid and each of them punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party (the plaintiff herein) shall become utterly null and void, but the rights and interests hereby created or then existing in favor of the second party or derived from him shall utterly cease and determine, and the right of possession, and all equitable and legal interest in the premises hereby contracted, shall revert to and revest in said first party without any declaration of forfeiture or act of re-entry or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or service performed as absolutely, fully and perfectly as if this contract had never been made."

The pleader then goes on to say "that said forfeiture was and is absolute and unconditional and is not optional with the plaintiff, but was and is intended as therein expressed as a penalty for the non-fulfillment of said contract on the part of the defendant and the forfeiture by the defendant of the payments already made revests

the complete ownership of said premises in the plaintiff and is and was intended to be a full discharge and satisfaction of said contracts and all liabilities and obligations thereunder; wherefore the defendant says the plaintiff ought not to maintain his action."

We do not think that those allegations contained in this defense following \*the quotation from the contracts is borne out by the terms of the contracts. We think, from anything we can discover in the part of the contract cited and made a part of this defense, that there is nothing more than an ordinary contract; that, notwithstanding the allegation, it would still be at the option of the plaintiff whether it could release the defendant or not. It does not necessarily follow from the fact that the defendant has forfeited all his rights under the contracts, that the plaintiff is also barred of all rights it may have under the contract.

The demurrer is sustained.

## RAILROADS.

[Cuyahoga Common Pleas, May Term, 1878.]

**WILLIAM BERCHOLD V. L. S. & M. S. AND C. C. C. & I. RY. CO'S.**

Where one railroad runs over the track of another, they are jointly liable for an injury resulting from their failure to fence such track, and it is neither misjoinder of action nor parties to sue both jointly for the injury as a single cause of action.

**HAMILTON, J.**

This action was brought originally before a justice of the peace and appealed to this court. The petition sets out that the Cincinnati road was the owner of a certain track between this city and Berea; that it was operating the road, carrying passengers and freight, and that the Lake Shore & Michigan Southern Railway Co. had the right to run its trains over the road, so that there was a joint occupancy by the two companies in the running and management of this road; that it therefore became the duty of both these companies, being in the actual occupancy of this road, to fence the tracks in accordance with the law of this state, so as to prevent animals getting upon the track and receiving injuries.

The petition states that the plaintiff was the owner of a certain cow, which, through some instrumentality unknown to him, perhaps through the agency of certain other parties, to him unknown, got out of his enclosure and upon the track of these railroads, without any fault of the plaintiff, and was there killed by a passing train run by the Lake Shore & Michigan Southern Railway Co., whereby the plaintiff was damaged.

The plaintiff also avers that it was through the carelessness and fault of the Lake Shore & Michigan Southern Railway Com-

pany, in running its train, that the immediate injury to the cow resulted, in consequence of which injury it was necessary to kill the cow.

At a former term of this court, a motion was interposed to require the plaintiff to specifically state and number his causes of action upon the ground that there was a cause of action set out against both of these defendants as jointly liable for joint negligence, and also a cause of action set out against the Michigan Southern Railroad Co. for its single negligence. That motion was overruled.

The defendants now come in and interpose separate demurrers. That of the Cincinnati road, is, in substance, that there is no cause of action set out in the petition against it separately, nor jointly with its codefendant. It amounts therefore, to a general demurrer upon the ground that there is not a cause of action set out against the defendant, the Cincinnati road. We think the demurrer should be overruled. We think it is plainly averred that this damage resulted from the neglect to fence this road, which it is averred, was its duty to do.

The other defendant, the Lake Shore & Michigan Southern Railway Co., demurs upon two grounds: first, that there is a defect of parties defendant. If there are too many defendants, that is an objection that cannot be taken by demurrer. The second ground is a misjoinder of causes of action. It is perhaps enough to say, that upon the motion to separately state and number the causes of action, this court has said that there was not two causes of action. We also think upon a consideration of the whole case, upon the merits, the demurrer should be overruled.

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#### **MASTER AND SERVANT.**

[Hamilton District Court, 1878.]

**M. WERK & CO. V. ADAM ARMSBRUST.**

For opinion in this case see 3 B., 866.

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#### **\*INTEREST AND USURY.**

[Hamilton District Court, 1878.]

**W. P. HULBERT V. H. M. CIST, ASSIGNEE OF A. ROSS ET AL.**

For opinion in this case see 3 B., 868.

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#### **\*EVIDENCE—RAILROAD SUBSCRIPTION.**

[Hamilton District Court, 1878.]

**BENJAMIN FREEMAN V. AUGUST MUTH.**

For opinion in this case see 3 B., 914.

**\*NEGLIGENCE OF PUBLIC CONTRACTORS.****328**

[Cuyahoga Common Pleas, November Term, 1878.]

**HENRY PEARS V. THE CITY OF CLEVELAND.**

1. If contractors who are repairing a street borrow a steam roller from the city, and place it over night on the traveled street, the city is not liable if it frighten a horse, unless the roller was calculated to frighten horses ordinarily safe, and that he was the servant of the city, acting within the scope of his employment in putting it in a place disconnected with the work, or that the city had notice of the nuisance or obstruction and a reasonable time to remove it.
2. If a horse driven by its owner become frightened at such an obstruction, and a person riding with him is injured, the contributory negligence of such owner is not imputed to such person unless such owner was his agent, or unless such person should have expostulated and got out, so as to avoid the risk

This action was brought to recover for an injury to the person of the plaintiff occasioned by a horse taking fright at a steam roller at the time standing upon one of the streets of the city. The roller had been in use during the day by contractors in repairing a pavement and had been placed upon a street adjacent, where the accident occurred, to remain for the night. The roller was the property of the city. The plaintiff was riding with a neighbor who was the owner of the horse and buggy, and was injured by the buggy being overturned, throwing him upon the ground.

It was claimed on behalf of the plaintiff that the roller was an object calculated to frighten horses ordinarily gentle, a nuisance and obstruction upon the street; that suffering it to remain, being in violation of the duty imposed by statute, rendered the city liable.

Charge of the court.

HAMILTON, J.

Gentlemen of the jury: This action is brought by Henry Pears, plaintiff, against the city of Cleveland, defendant. The petition avers that the defendant is a municipal corporation, and that on or about the 8th of June, 1876, and prior thereto, there was an avenue within the corporate limits of said city known as Sterling avenue; that at about that day the city placed an obstruction in Sterling avenue, which consisted of a certain steam roller, that was calculated to frighten and alarm horses ordinarily gentle, and to interfere thus with the travel upon the highway; that it did, in fact, so frighten a horse and caused it to run away while propelling a vehicle in which this plaintiff was being drawn from the lower part of the city, perhaps to his home. It further avers that it was the duty of the city to keep that street, together with all other streets in the city, open, and in good repair, and free from nuisance; and it is averred that this was an obstruction—a nuisance, and that the city not only placed it there, but allowed it to remain there, and by reason of this conduct on the part of the city and its officers, this horse took fright, overturned the buggy in which this plaintiff was located, and caused great injury to him by reason of which he suffered damage, in the way of lost time, expenses of the

surgeon in dressing his wounds and caring for him, and in other ways to the extent of \$5,500, and he, therefore, asks damages at your hands to that amount.

The defendant, by his answer, says that it is a municipal corporation as charged, but denies the other averments of the petition. It further says that if any damage or injury has resulted to this plaintiff it was caused by his own want of care, by his own negligence, and not  
**329** from any negligence or want of care on the part of \*the city. These, then, are the issues that are presented for your consideration.

The statute which has been read in your hearing places the streets of the city under the care, supervision and control of the city, and makes it the duty of the city to keep those avenues, alleys, sidewalks and public grounds open and in repair, and free from nuisance. The existence of that law imposes a duty upon the city as designated there, and for a failure to perform that duty the city is liable, but the mere existence of the act itself, and the mere existence of an obstruction or nuisance is not alone sufficient to render the city liable. There must, in my judgment, be a further element of a failure of duty after it has been brought to the attention of the city that such a nuisance exists. That is the force of the statute, so that in connection with this statute thus defining the duties of the city under the statute alone, it would become necessary that there be some negligence. It is not every act, or rather every failure to act upon the part of the city under this statute that would create a liability.

An obstruction might be placed upon the highway in the night season, without notice to the city or any of its officials, and under such circumstances as to render the city not liable though an accident might occur from it. It must receive a reasonable construction. If, for instance, a third party places an obstruction in the street in such a way as to make it a nuisance, and some one comes along and is injured, unless the city had some express notice, or unless it has remained there such length of time, and under such circumstances that it can be reasonably inferred the city would be apprised of its existence, there would be no liability on the part of the city for failure to remove it before it had any notification of its existence, either actual or constructive.

But it is said that this roller was the property of the city; that it was loaned to certain parties for the purpose of repairing a highway, to wit: Euclid avenue, within the corporate limits; and that the parties to whom it was thus loaned had been, the year before, the contractors for repairing that highway by laying an asphaltum pavement; that the pavement from some cause or other had proved to be defective in some portions of it, and that, for the purpose of repairing that, the succeeding year after it had been laid, having been laid in 1875, that the city loaned these contractors this roller, and they went on and were in the act of making the suitable and necessary repairs upon that highway with this roller; that while thus engaged these contractors had taken it off from Euclid avenue,



where there was constant and much travel on to a side street, to wit: Sterling avenue, where there was much less travel, and there deposited it for the night until they should again want to use it in the morning.

Now, it is claimed on the part of the plaintiff in this case, that the circumstances thus of the roller being there, were such as to make the leaving of it there, the act of the city, and although it was done by other parties, was substantially done by the agents of the city; that these contractors, under the circumstances, were the agents or the servants of the city; though it did not do it itself, did it through its agents or servants, and placed this machine in the condition in which it was found on Sterling avenue and, therefore, chargeable with placing it on Sterling avenue. And in this connection much has been said about the doctrine of *respondeat superior*, or in other words, that the principal must respond for the act of his inferior or of his agent. In order to have this doctrine apply at all—have any application in the case—there must have existed between the city and these parties, the relation of master and servant, or of principal and agent, either by force of the facts or by the application of the law to the case, for this doctrine can not apply, the superior being responsible for the act of the inferior, unless such relations existed as I before stated; the relation cannot exist, the doctrine cannot be applicable unless this doctrine of master and servant, or of principal and agent existed between the city and these parties who did the work. That is the question for your determination under the evidence. It is said the city cannot relieve itself from the responsibility the law imposes upon it, to wit: to take care of the streets, to keep them open and free from obstructions. To the extent that they are responsible for any nuisance and obstruction upon the highway, within the limit of the law which I have heretofore stated, it is to have actual or constructive notices of the existence of those obstructions or nuisances, before a liability accrues. This doctrine is correct. It cannot relieve itself, whatever may be the contract between it and the contractors in respect to these existing obstructions and nuisances, but, so far as this doctrine of principal and agent, master and servant is concerned, when that doctrine is to apply, that relationship must exist. That would be a doctrine which would be applicable independent of any statute; the other is by force of the statute, to wit: that they are liable if they do not keep these streets free, etc., from nuisances and obstruction. I, therefore, say to you as the supreme court has said in the 5th of the Ohio St. Reports, that "The liability of one person for damages arising from the negligence or malfeasance of another, on the principle of *respondeat superior*, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating those relations, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract.

But where the employer retains the control and direction over

the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent."

The city retains a supervising control over the acts and mode and manner of their doing their work; then it is responsible, though there be contractors who do the work and do the injury; but otherwise than that, we think the rule applies to municipal corporations, so far as this doctrine of *respondeat superior* is concerned, in substantially the same respect that it does in relation to any other parties.

This case from which I have quoted from the supreme court was against the City of Cincinnati. It was sought to make the city responsible there for the act of a contractor for having piled up a heap of rubbish and stone along the side of the road; a heavy rain having fallen, the premises of the plaintiff were flooded and he received injury therefrom. And the supreme court lays down this as the general doctrine in relation to municipal corporations the same as it pertains to individuals. Again, if under all the facts and evidence as it shall have been detailed to you, you find this relation of servant and master, principal and agent existing between the parties who did this work and the city you may still inquire whether they were acting within the scope of their employment in running this machine from the place where it was being used upon

330 Euclid avenue to a different\* place in the city and entirely disconnected with the work that was being done. The act complained of is not the negligence in doing the work itself, but in the disposition that was made of the roller after the work was done for the day in placing it somewhere else. Was this within the scope of the employment that was authorized or permitted by the city? If so, or if the city consented that it might be so placed—had knowledge of the fact, if you find this relation as heretofore stated as existing—then you may regard it as its act. If not, then it was not the act of the city. But suppose you shall find there was no such relation of master and servant, or of principal and agent; and that you shall find that there was no permission given by the city to place this roller upon the street there, that it had not been done with its consent and knowledge, and, therefore, was not the act of the city in placing it there, then, should the city be liable for negligence in allowing it to remain there?

Now that will depend upon the fact whether the city, if you shall find it was the act of the city, placed it there; then, of course they had knowledge of the question of notice is out of the case.

But suppose it to be the act of independent parties without any permission or authority or consent on the part of the city in placing it there, is the city liable for allowing it to remain there?

Now, under the statute which has been read in your hearing, the city must keep the highways free from nuisance and obstruction and that depends upon whether the city knew of its existence

—has any sort of knowledge that it was to remain there upon Sterling avenue over night. It is said to have been placed there after the conclusion of the day's work. The accident happened about half past six in the evening. If the work was concluded at six o'clock, it had remained there a half hour. Now did the city have any notice that it was there; and if it had did a reasonable time elapse for the city to remove it? If you answer all these questions in the affirmative, and that the city was negligent in leaving it there, then the city would be liable, if not, the city was not liable.

Again: If you shall find all these things in favor of the plaintiff or any of them so as to render the city liable under the rules I have given you, it must further appear in evidence before you that notwithstanding you may find that the city was negligent in thus keeping this machine there—of course, I assume in these remarks that you must first find that this machine was an instrument that was calculated to frighten horses that were ordinarily safe. I say if you shall so find that it was such an instrument, and the city was negligent in allowing it to remain there, then it must further appear to your satisfaction that this plaintiff was not also guilty of negligence, contributing in some sense to this accident, some cause or connection being between the accident and his own negligence.

If you shall find affirmatively that he was not negligent, then that must appear to you from all the evidence in the case, was guilty of no negligence contributing to this accident in any way, either in a large or small degree, then he may recover. But, if you shall find that there was contributory negligence on the part of plaintiff there can be no recovery, notwithstanding there was negligence on the part of the defendant. Now, what are the facts relative to this case? It is said that this machine was placed there when it was yet broad daylight; that when he came in view of it—a hundred or a hundred and fifty feet at least before he reached it—that he was apprised of the character of the machine. It is further claimed that he actually saw at the time just prior to the accident that occurred to him, a team driven by, so that he was apprised of its presence and of its character; and it is said that in view of all those facts that there was negligence on his part.

Now, I may say to you in respect to that, that the plaintiff in this case was a passenger, as it were, with another party with whom he was riding from his work home, which, it is said, he had been in the habit of doing.

Now, if he was a mere passenger, the negligence of Mr. Dow cannot be attributed to him; in other words, if there was negligence on the part of Dow, and negligence on the part of city and no negligence on the part of the plaintiff; if it was the work jointly of the negligence of Dow and the city, there may be a recovery against the city, or there might be recovery against Dow.

But what was the nature of this transaction? Was Dow in any sense the agent of this party? Were they cooperating there in

what they did? Was there any call for this plaintiff to take action? When injury was impending should he have expostulated in passing? Should he have got out of the buggy and not undertaken the risk himself? I only speak of this relation of Dow to explain the application of the law to the negligence of Dow and of this plaintiff, and can say to you that if there was contributory negligence on the part of the plaintiff, he cannot recover. This is a question of fact for your determination from all the evidence in the case.

In this, as in any other case, the burden of proof is upon the plaintiff, to make out his case by a fair preponderance of the evidence; if he shall fail to satisfy you of the truth of his allegations, then it will be your duty to return a verdict for the defendant. If he shall satisfy you of the truth of them by a fair preponderance of the evidence, under the rules of law which I have given to you, it will be your duty to return a verdict for the plaintiff, giving him such damages as will, in short, make him whole. In estimating that, you will consider the loss of time, the injury which he sustained, the surgeon's bill, together with all the expenses connected with it as detailed in the evidence.

Breckenridge & Hester for plaintiff; Heisley, Way & Wallace for defendant.

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## \*BILLS AND NOTES.

[Cuyahoga Common Pleas, November Term, 1878.]

ELIAS SIMMS v. JAMES W. FIELD ET AL.

An answer of the last endorser stating that he endorsed for the accommodation of the plaintiff and a prior endorser, to enable them to take up a prior note, and that the prior endorser received whatever consideration was paid by plaintiff for the note, is a good answer.

CALDWELL, J.

This is a demurrer to the answer of Alfred Kellogg. Alfred Kellogg, one of the defendants, answered separately to the petition which is brought by Elias Simms. The petition is founded upon a promissory note which reads:

"Cleveland, Ohio, August 21, 1877.

One year after date I promise to pay to the order of W. C. North, two thousand dollars with interest at the rate of eight per cent. per annum. Value received. James W. Field.

Endorsed: "Demand of payment and notice of protest waived. W. C. North.

"Demand of payment and notice of protest waived.

Alfred Kellogg."

And the plaintiff says that there are no credits and that there is due from North to him as principal and the others as endorsers the amount due upon the note.

The defendant, Alfred Kellogg, makes separate answer and says that the note mentioned and described in said petition, was given and executed by the parties thereto, to take up a note that was previously given on or about August 18, 1876, by the same parties and endorsed by the plaintiff.

He further says that he endorsed said note after the same was executed and delivered to the defendant North, by the the defendant Field, and sometime subsequent to the endorsement of the same by said North, and that said endorsement upon said note was without consideration and for the accommodation of the plaintiff in this case and the defendant North; that said note dated in August 8, 1876, was negotiated to the plaintiff by defendant North, who received from said plaintiff whatever consideration was paid therefor; and, therefore, avers that he is not liable upon said note as endorser or otherwise.

An averment by a party that he is not liable is wholly immaterial, is not a statement of any fact, is only a conclusion from the facts which have already been stated. If it rested there the demurrer to this answer should be sustained; but such is not the fact, because this defendant avers that he endorsed the note given in August, 1876, for the accommodation of the plaintiff and North, and that this note was given in lieu of that note, took its place, and that was also endorsed by this defendant for the accommodation of North and the plaintiff.

Now, if this answer states one fact which would constitute a defense the demurrer must be overruled.

It states a fact: that he was the accommodation endorser for the plaintiff and North. If he was, the plaintiff cannot maintain the action. I think that fact is sufficiently stated; and if such be the fact the plaintiff could no more recover of him than a principal could sue his surety in ordinary cases; for if this defendant was compelled to pay this note, if he was in fact an accommodation endorser for the plaintiff, therefore simply standing in the relation of surety he could recover it back again, which is only a mode of reasoning to show that an accommodation endorser or surety is not liable to his principal.

\*The demurrer must be overruled.

Geo. F. Chapman and H. C. Ranney; Groot and Blandin. 338

## EVIDENCE.

[Lake County Common Pleas.]

### STATE OF OHIO v. IRWIN C. CARLYLE.

Where a witness gives testimony which takes the party calling him by surprise, such witness may be cross-examined as to contrary declaration, made out of court, to refresh his recollection, but his answers cannot be contradicted. But either party may prove subornation of his or the other party's witnesses.

A Mrs. Joiner was called by the state as a witness and gave testimony, which counsel for the state claimed had taken them by surprise and they offered to show that the witness had made statements out of court, by affidavit and otherwise, contradictory to her testimony upon the trial.

WOODBURY, J.

The questions which are raised in these propositions are of a great deal of importance. It must be evident from the authorities which have been read, that it is a question which has often been mooted in our courts. It is insisted upon the part of the state that it may show, first, that it has been taken by surprise in the testimony of the witness last upon the stand; and secondly, that, upon that showing it may proceed to examine the witness in regard to statements claimed to have been made out of court; both in affidavits and to counsel for the state, conflicting with the testimony of the witness upon the stand, and thirdly that it may show, in addition to this, that the witness has, both by declaration to counsel and in affidavits, made such statements. This is objected to on the part of the defendant.

There is still another proposition, which, perhaps, may be first disposed of. It is proposed upon the part of the state to prove that the witness has been tampered with, or, in other words, influenced in her testimony upon the stand, by the defendant. To this, as I understand, the defense does not object, but on the contrary, it invites investigation. Upon this statement and under these circumstances, we think the court would not be warranted in refusing to permit it, but that either party, whether the witness be his own witness or a witness upon the other side, may show, either in a criminal or a civil case, that a party has attempted to suborn the witness. On that proposition I believe the law to be well settled.

But now upon the other question. May a party impeach his own witness? There is no conflict between counsel upon the proposition that he may not call witnesses to impair the general character or reputation of his witness by general evidence, and there would seem to be little or no conflict in the authorities upon this question. But it is insisted upon the part of the state that it may impeach the witness by showing that she has made statements out of court different from what she has testified upon the stand, and that this was the rule of common law.

Upon this question the first authority that was read was Phillips on Evidence. He has largely discussed several decisions which had been made by the common law courts of England, and conceding that there was a conflict in the authorities or in the decisions of the different courts of England, he seems to have arrived at the conclusion that, under certain circumstances it might be done when it was shown that there was surprise; and the decision of one of the judges holding this opinion is largely quoted by the author; so that, so far as the author himself is concerned,

we have the weight of his opinion in favor of the admissibility of this testimony.

But what effect did it have in England? Did the weight of his opinion settle the law in England as to the admissibility of this testimony? We think it did not. We find in the notes to Greenleaf upon Evidence that subsequent decisions were made by the courts of England holding to the contrary; and it seems from the best lights we can get, that it was still a mooted question in England down to 1854. Courts were sometimes holding one way and sometimes another, as the circumstances of each particular case seemed to bear upon the judgment and conscience of the court making the decision, when in 1854, parliament intervened and passed an act which settled the law.

Now, by all legal rules of construction and inference, our courts when investigating this question with a view to determining what the common law was prior to the passage of this act, would hold that the act of parliament was not the bare expression of the common law. If it was, then there was no necessity of parliament intervening or attempting to define what the law should be upon this particular question; and I am satisfied, both from the legal inference to be drawn and the decisions made by the common law courts of England, that this was a mooted question, and that there was reason for parliament to thus provide in the act which has been cited. Now, in the first editions of Greenleaf upon Evidence, in original section 444, the author seems to have adopted in a measure the earlier decisions made by the common law courts of England, and he cites those decisions, and perhaps one or two earlier decisions made by the supreme court of Massachusetts; but in the main, he relies as an authority for the doctrine laid down in the text upon the earlier decisions which were made by the common law courts of England, and those principally which are cited by Phillips in his treatise upon Evidence. In the later editions of Greenleaf upon Evidence, we find an additional section made a part of the text by the editor. We are unable to say when this section first appeared.

But let us see whether or not this subsequent section is entitled to any weight as an authority upon this question. Who was the editor of this edition which is presented now and contains this 444th section A? Why it was no more nor less a man than Judge Redfield, one of the best lawyers in the United States. Upon this and any other question his judgment and opinion would be worth as much as Mr. Greenleaf's. While Mr. Greenleaf had written an able work upon evidence which had become a standard authority in the United States, which in the main was followed, although it was never regarded by the profession generally as the equal in ability of Starkie upon Evidence; yet he was a man who had but little practice at the bar. (I think however, it would be generally conceded by the profession that Judge Redfield would be as good an

authority upon any proposition of law as would Mr. Greenleaf or, perhaps, any other man in the United States.)

Now, have the decisions of the courts of this country upon this question followed the law laid down by Greenleaf? It is certain that it was not followed in Massachusetts, and that, so far as the courts of that state are concerned, they have held the common law to be different. That state has certainly possessed able judges. Among the opinions which are cited is the opinion of Judge Shaw, a very able man. So that we have, as against this main proposition, the united authority of the supreme courts of the state of Massachusetts and of the state of New York. There will be found still another decision which has not been cited (my remembrance is 339 it is to be found in the 34th of Indiana), showing that the supreme court of the state of Indiana have substantially followed the same rule which is laid down by the court of appeals of New York in the 53d of New York Reports. And it is said by counsel that the supreme court of the state of Missouri have thus held. There are cited as against this—as evidence of what the common law is—decisions of the supreme courts of the states of Georgia, Alabama and Kentucky, and also a decision in Breckinridge's Reports, made by an inferior court in the state of Pennsylvania, probably of the city of Philadelphia or Pittsburg. We have simply a syllabus of the case as found in the United States Digest. Now the question is where lies the weight of authority, and what is the common law upon this proposition. The general rule is conceded that a party may not put a witness upon the stand and after he has testified, turn around and call witnesses to show that the reputation of such witness for truth and veracity is not good.

He may not do this, and probably no decision made by a court of any respectability can be found holding this doctrine. May he accomplish the same end by another means which is pointed out by the law for the purpose of impeaching or impairing the credibility of a witness? There would be as much reason for doing it in the one case as in the other. In other words—that may be stating the proposition too broadly—but the same reasons which would prevent him from showing that his witness was not entitled to credit by showing the bad reputation of the witness, would, to a large extent, at least, prevent him from impeaching or impairing the credibility of his witness by impeaching him in the other manner known to the law for the impeachment of witnesses. It is true that in Massachusetts the legislature has intervened, and by statutory law a party may now under certain circumstances show, after showing that he has been taken by surprise in the testimony of his witness, that his witness has made statements out of court different from those made in court. But this only shows what was the settled rule of the common law in Massachusetts and that at common law it could not be done.

There being no statutory law in Ohio bearing upon this question, it must be settled by the rules of the common law. There is



another rule of construction that intervenes in a criminal case; wherever there is a doubt, either in the judicial mind in the construction of a statute or of the criminal common law, or a doubt in the minds of the jury that doubt is to be resolved in favor of the accused. That rule is laid by Bishop in his work on criminal law—one of the best writers in the United States—upon that subject. This rule grows out of the humanity of the law.

Now, then, how stands the weight of authority upon this question? With the decisions of the supreme courts of the states of New York, Massachusetts, Indiana, and Missouri holding one way, (whether there are more or not I have not examined to see and cannot say), and with the decisions of the supreme courts of Georgia, Alabama and Kentucky, and of an inferior court of Pennsylvania the other way, where lies the weight of authority? According to all of our notions and to the general opinion of the bar of Ohio, the decisions of the supreme courts of Massachusetts and New York have much larger influence and are entitled to much more weight than the decisions of the supreme courts either of Georgia or of Alabama; and I think it will be found as a rule that the supreme court of the state of Ohio, wherever there has been a conflict between the holdings in the state of New York or Massachusetts, and the holdings in the state of Georgia or Alabama, have in the main followed the decisions of New York and of Massachusetts. And so, too, of Vermont, of Rhode Island, and of the New England states. They have usually been regarded as decisions showing more ability than have those of the Southern courts. There are some of the Southern courts that stand well. I saw, to my surprise, but a few days ago that Judge Miller had said that the decisions of the supreme court of South Carolina stood as high as the decisions of any court in the United States. But in my judgment, the decisions of Massachusetts and of New York upon this question should be followed, when taken in connection with the rule as we find it laid down by Judge Redfield in this additional section in *Greenleaf upon Evidence*. I am inclined to think that the weight of authority is against this proposition, and so far as I know, it has been the general holding in Ohio. I have never known an instance in this state where a party has been permitted, after calling a witness, under any circumstances, to come in and to show contradictory statements made out of court, for the purpose of impeaching the witness; and, from the authorities we hold that the state in this case could not do it.

Now as to this second proposition: May the state examine this witness in regard to statements claimed to have been made out of court different from those made in court, for any purpose—not for the purpose of impeachment, but for the purpose of refreshing the memory of the witness, and thereby enable the witness, after being thus refreshed by having her attention called to the statement, to correct herself if she has made a mistake or has forgotten? May the state do this? The court of appeal of the state of New York, in the 53d

of New York, hold to this rule<sup>2</sup>; and the supreme court of the state of Indiana in the 32d of Indiana, in the case of Howard v. The State, lay down this proposition: Where a witness testifies contrary to what the party calling him had the right to expect, he may be cross-examined by such party as to what he had stated in regard to the matter on former occasions, for the purpose of refreshing his memory and giving him an opportunity to set the matter right if he will, and to set the party introducing him right before the jury, but not for the purpose of discrediting the witness; nor will such party be allowed to prove such previous contradictory statements if denied by the witness. This seems to be the rule adopted by Judge Redfield in the 44th section A of Greenleaf upon Evidence. To this extent, and for this purpose, and not for the purpose of impairing the credibility of the witness, we think that the weight of authority is that the state may make such examination.

Prosecuting Attorney Sterling, J. B. Burrows, Esq., Hon. M. A. Foran, — Williams, Esq., and — Komar, Esq., for the state; S. E. Adams, Esq., Tinker & Alvord, and G. H. Barrett, Esq., for the defendant.

### FIRE INSURANCE.

[Cuyahoga Common Pleas, September Term, 1878.]

#### MERCHANTS' NATIONAL BANK v. INS. CO. OF NORTH AMERICA.

1. False swearing as to the amount of loss, to avoid the policy, must be wilful, and not merely inadvertent or negligent.
2. One to whom the loss, if any, is payable, is in no better position than the assured, and false swearing or fraud of the assured will defeat such payee, the same as it would the assured.
3. Where defendant company insured for \$2,000 and there is other insurance of \$5,000, the recovery must be for two-sevenths of the loss.

HAMILTON, J.

The action in this case was upon a policy of insurance made by the Insurance Company of North America for \$2,000 upon the stock of liquors in the store of J. Mellor. The policy was assigned and made payable to the Merchants' National Bank. A fire occurred during the life of the policy in \*which the most of the goods were burned up. There was, besides the insurance of the defendant, an insurance to the amount of \$5,000 upon the stock and fixtures. Mellor made out proofs of the loss claiming that the stock destroyed amounted to about \$11,000. The defense claim that there was fraud upon the part of Mellor in representing the value of the stock insured and also that the amount of loss made out was false and fraudulent. The trial of the case occupied near a week, the greater part of the time taken up by the defense in proving that Mellor had removed a large portion of the stock before the fire, and that there was but small value in it at the time the fire occurred. The jury were directed by the court to return a special

verdict as to the value of the stock at the time of the fire and their special verdict found that the value of the stock was only about \$1,400.00, and the verdict was given for the plaintiff for two-sevenths of that amount, being a proportionate share.

Gentlemen of the Jury: This action is brought by the plaintiff, the Merchants' National Bank, against the Insurance Company of North America. This policy has been offered in your hearing, the policy declaring that it insured the stock of goods in a store on River street belonging to one Mellor for the sum of \$2,000. The petition recites the policy and alleges that the assured has performed all the conditions imposed by the policy to be performed, and that a loss has been sustained of more than is covered by this policy.

It is also averred that after the policy was issued, in April, 1875, to wit: In August following, there was an indorsement placed upon this policy by which it was stipulated and agreed that this company, the defendant in this action, should pay any loss which might occur upon this policy to the plaintiff, the Merchants' National Bank, as its interests should appear. The defendant interposes an answer and says that that application was made in writing; that therein certain representations were made as to the value of this property so assured; that these representations were false and fraudulent, and it further says that outside of this application certain misrepresentations were made as to the value of this property, by which a larger amount of property was insured than otherwise would have been insured. It is further expressly averred that it was one of the stipulations of this policy that in case of a loss, or in any case, that if the assured should, by false swearing or otherwise, attempt to defraud the company, then the policy should be void and no recovery could be had under it. And it is further said that whatever loss occurred was occasioned by the willful act of Mellor the assured. It is further said in the answer that there was other insurance upon this property, to wit: to the extent of \$5,000 which, with this policy, makes the sum of insurance \$7,000, and that in no case is the defendant liable for more than a proportionate share of the loss; and that the loss was not near as great as represented by the plaintiff in this action; that in no event did it exceed the sum of \$2,000, and they say that for these reasons, thus set forth, the plaintiff is not entitled to a recovery at all, or if entitled to such recovery it must in a very small amount, to wit: to the share this policy bears to the other policies in relation to the loss.

The reply of the plaintiff is to the effect, that it concedes that there was other insurance to the amount of \$5,000, but denies all the other allegations of the answer. In reference to this matter of the application of the misrepresentations it is sufficient to say that no application has been introduced in evidence; nothing, therefore, is claimed upon that ground.

In reference to any misrepresentation that was made outside

of the application perhaps it would not be too much to say that there is no testimony bearing upon that subject.

I do not understand the defendant's counsel to claim anything, therefore, upon that ground of misrepresentation. The issue, therefore, is simplified very much. What remains is more a question of fact than of law; to determine the respective rights of these parties, and this question of fact, of course, is with you only. You will, therefore, inquire upon the first proposition as to whether or not there was a fraudulent representation of the value of this property at the time of the loss, or afterwards, with a view to attain or enable him to recover a greater insurance or a greater amount, than the actual loss suffered under this policy. And, for the purposes of this case, I will say to you that the plaintiff in this action occupies the same relation to this case that Mellor, the assured would under this policy, were he standing here as the plaintiff in this action instead of the Merchants' National Bank; that if Mellor falsely and fraudulently made these statements in respect to his loss, with a view to recover the amounts, knowing them to be false, then I say to you there can be no recovery under this contract in favor of the plaintiff.

Did he then when he made these representations—this statement under oath, make a maliciously false statement—make a statement knowing that he was representing the value of this property consumed by fire to be much greater than it was, and with a view to defraud this company? In determining that question you will consider what was his relation to the property. Did he know all about it? Did he know the loss? Was he acquainted with his own stock of goods? If he did, and made this statement knowing it to be false, then I say to you there can be no recovery. But if it was an inadvertence, if there was any error about it accidentally made, negligently made, in any way outside of willful wrong designed to be perpetrated on his part, then there may be a recovery if you shall find the other things in its favor.

It is further said that it was the willful act of this party that occasioned this loss, if any did occur. Now, gentlemen, you will consider that branch of the case. See if there is anything in the evidence to warrant that assertion. Are you satisfied that this is true? Mere neglect will not make that proposition true, the neglect of the assured or of anyone else.

It must be the willful, wrongful act of this party. If he occasioned this loss by his own act, then, of course, this being an action for indemnity there can be no recovery under this policy.

In reference to the interest that this bank has in this stock of goods, it may, perhaps, be regarded as conceded that whatever interest Mellor had in the goods belongs to this bank for the purposes of this suit, there being no claim perhaps, but that the interest Mellor had this plaintiff had a right to recover for, that interest being assigned and transferred to the bank as collateral security for

an indebtedness which is conceded to be ample to cover all the insurance of this policy.

A considerable has been said about this warehouse receipt. I do not understand that there is anything in that warehouse receipt in respect to the title to the property or otherwise except that it is an item of evidence which will assist you in arriving at a determination of the main question, to wit: what was the actual loss, evidencing their interest or otherwise. Perhaps it is not very material, it being conceded that the interest of Mellor in this case belongs to these parties for the purposes of this suit. Now, gentlemen, if you shall find either that this loss occurred from the willful act of Mellor, or that he fraudulently represented when he made this \*statement of the value of these goods, knowingly 341 did it, then there can be no recovery on the part of the plaintiff. But if they have not succeeded in making this out, it being for the defense to establish this, to your satisfaction, you will then inquire as to the actual loss, for this recovery is to be for the actual loss irrespective of the amount insured, because that puts a limit upon the amount of recovery.

Now what was the amount of goods that was destroyed by this fire, covered by this policy? You will take all the evidence, gentlemen, scrutinize it closely, look at all the circumstances. I shall not attempt at this time to rehearse any portion of the evidence; it has been called to your attention by the counsel in this case and occupied your careful attention for many days. You should look at it very carefully, and if you shall be satisfied that this loss actually occurred; that the amount of goods exceeded the sum of \$7,000 at the time of the loss, then the plaintiff, if you shall have found to the other questions which I have submitted to you, in its favor, would be entitled to recover the amount of the policy, with interest from the time of the loss. If you shall find that the amount of the loss was less than \$7,000, then you will ascertain, first, what was the loss; then you will apportion the loss by considering the amount insured in the other companies and in this company. You will give the plaintiff a verdict for those sums together with interest from the time of the loss.

These are the questions for you to consider. As I have said, if you shall be satisfied that there was a fraud perpetrated in making this statement of the loss, with a view to recover under it, if it was the basis of the statement, then it would invalidate the policy. Of course, if there was a willful destruction of property the plaintiff could not recover. That is for the defense to establish. On the other hand, if the plaintiff, by a fair preponderance of evidence, has established this loss and the amount of it, it would be a *prima facie* compliance with the stipulation of this policy.

I am requested to ask you to make a special finding. If you find for the plaintiff generally you will say so and assess the damages at so much; if you find for the defendant, generally, you will say so.

In addition, if you shall find for the plaintiff, you may find this proposition; what was the cash value of the goods at the time of their destruction by fire? I will say to you if you find for the plaintiff you may then find substantially the cash value of the property destroyed by the fire and covered by the policies at the time of the loss.

J. J. Carran and R. P. Ranney for plaintiff; S. O. Griswold and T. B. Baxton for defendant.

### VACATION OF JUDGMENT—ANSWER TO AMENDED PETITION.

[Cuyahoga Common Pleas, September Term, 1878.]

CUNNINGHAM V. MATHIVET.

1. A default judgment will be set aside where an answer offered states a perfect defense, and it is shown that the omission to file was caused by counsel being engaged in trial of a cause.
2. It is the practice, in the absence of a code provision, and no rule of court existing, to give as long a time to answer an amended petition as the original.

CALDWELL, J.

This is a motion to vacate a judgment and set aside default at this term. We suppose that on filing the motion counsel labored under the misapprehension—the case being continued at the last term, that under the 33d rule of the court, the default was bailed and that the defendant would have until the second Saturday after the adjournment of the court to file an answer. I am satisfied that the defendant was not in default at the time the court adjourned. The plaintiff had leave to file an amended petition by the 12th day of October; which was filed on that day. The 3d Saturday after that would be the 2d day of November. Now, there is no rule of court, no printed or written rule, that I am aware of, nor does the statute fix a time where there is no time fixed by the court, when an answer shall be filed to an amended petition. In this case the party had leave to file an amended petition and that filing was done on the 12th day of October. Now the question is, when would be the rule day for filing an answer to an amended petition? I have always understood the practice to be that where plaintiff amends his petition the defendant has the same length of time in which to answer that amended petition that he would have to answer an original petition. The third Saturday was the 2d day of November. The court adjourned on that day and the defendant had all of that day to answer, so that when the court adjourned he was not in default. But counsel for defendant come with an answer, and professional statement made by Mr. Ingersoll in regard to the matter, which satisfies me that it was one of those unavoidable overlookings that counsel are always liable to when they are engaged in the trial of causes elsewhere. He states he was engaged in the trial of a cause in the federal courts and for that rea-

son had not an opportunity to attend to it and the answer presented shows a perfect defense, etc. It would be a great hardship upon the defendant to be compelled to pay this judgment. The answer sets forth that the amount claimed by the plaintiff was a balance due on a contract and which had been assigned to the plaintiff by one James Turney, and the defendant says that prior to that time, Turney being indebted to one Sizer had taken the balance due upon this contract to Sizer and that Turney when he transferred it understood that fact and that Sizer had accepted it, and the defendant paid to Sizer the whole amount that was due with the knowledge of this Turney, and that afterwards, after that was all done, then assigned the claim again to the plaintiff, so that there was nothing in fact due. He paid the debt at the request and with the knowledge of the assignor of the claim. It was not a negotiable instrument.

If this answer is true it is a perfect defense to the plaintiff's claim and we think that the motion ought to be granted and the default set aside.●

Groot & Blandin for plaintiff; Ingersoll & Williamson for defendant.

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**\*DIVORCE.**

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[Hamilton District Court, November Term, 1878.]

**ANNA MARIA MEYER V. HERMAN MEYER.**

Mere fraudulent misrepresentations in a marriage contract as to name, fortune, or social standing of the parties, are not sufficient grounds for the granting of a divorce on the ground of fraud.

This decision will be found in 3 B., 985.

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**\*LIABILITY OF MARRIED WOMEN.**

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[Cuyahoga Common Pleas, November Term, 1878.]

†**MARTIN MAURER V. N. C. BREWER ET AL.**

Liability of married woman on an agreement to assume payment of mortgage upon real estate purchased by her, and of her grantee who assumes to pay the mortgage.

CADWELL, J.

The petition states that on the 27th of June, 1872, George Braundel executed and delivered to plaintiff, Martin Maurer, sixteen notes of \$100 each payable one every three months with interest and gave the plaintiff a mortgage to secure them. That on the 3d day of May, 1875, George Braundel, the mortgagor, deeded

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†The judgment in this case was affirmed by the district court, by opinion 2 Clev., 155.

the premises to one Mary Braundel, she assuming the payment of these notes and mortgage; that on the 13th of October, 1875, Mary Braundel and her husband John, conveyed the premises to L. B. French, who, by the terms of the deed, to him, agreed to pay the notes and mortgages; that on the 24th of December, 1875, L. B. French conveyed the premises to the defendants, Brewer and Truscott, who, by the terms of that deed were to pay the notes and mortgage; that the mortgage has been foreclosed, the land sold, and a balance remains due plaintiff of \$1,093.78, for which he prays for a personal judgment.

The answer sets up that Mary Braundel at the time of receiving this deed from George Braundel, was the wife of John Braundel; that in the deed was this clause: that "said grantee assumes a certain mortgage given by grantor to Martin Maurer, June 27, 1872, and interest thereon, as a part of the purchase money," and that on account of her being a married woman and having no other property she was not bound to pay the notes and mortgage, and by reason of the invalidity of that covenant, so far as she was concerned, there was no liability of French or the defendants to pay—that the deed from French and wife to the defendants, contained this: "The above is made subject to a certain mortgage for \$1,500" (one of the sixteen notes had been paid) "made by George Braundel to M. Maurer, and which the said grantees hereby assume and agree to pay, together with interest thereon."

The answer also states that the premises were conveyed by Mary Braundel to French, Oct. 13, 1875. The answer does not state that French by the terms of the deed to him agreed to pay the notes and mortgage, but it does not deny that it contained the agreement as stated in plaintiff's petition which is that the said French assumed and covenanted to pay said claim of this plaintiff so secured by mortgage upon said premises as aforesaid.

The defendants further say that plaintiff was not a party to the deed to the defendants by French, and is not entitled to maintain this action on account thereof or on account of any covenant therein contained; and that since deeding it to them—but the time is not stated—French for a good consideration, has released the defendants from all liability on account of that covenant, they are wholly discharged from all liability, and by reason thereof plaintiff cannot maintain the action.

The doctrine that a mortgagee may maintain an action to recover an amount due upon a mortgage against a grantee, who, by the terms of his deed has assumed and agreed to pay it, is fully recognized in the case of Crumbaugh v. Kugler, 3 O. S., 544, Trimble v. Strathers, 25 O. S., 378; Thompson v. Thompson et al., 4 O. S., 333. The supreme court of Rhode Island, in a decision made July 20, 1878, fully sustains this doctrine and cites a great number of authorities in support of it. I find but one case against it: Mellor, admr., v. Whipple, 1 Gray, Mass., 317.

The supreme court of this state in a case in the 4th Ohio St.,



says expressly that if the grantee made such promise it was upon sufficient consideration, and the mortgagee could therefore maintain an action of assumpsit upon it. The court in that case say it is well settled "that if one person makes promise to another for the benefit of a third person, that third person may maintain an action at law upon that promise." It was a question in that case whether the grantee did make the promise, the conveyance being only subject to the mortgage and the court do not decide whether that was a promise. It is claimed that this part of the decision was *obita dictum*, and hence no authority, but it does show the opinion of that court upon that question.

In 25 Ohio St., *Trimble v. Struthers*, 378, the court say "We do not question the former rulings of this court, that a party may maintain an action on a promise made for his benefit, although the consideration moved from another to whom the promise was made. But this rule must be understood and applied with its proper qualifications."

The qualification in that case was that the agreement between the direct parties, had been rescinded before the third person had accepted it, and the defendants in this case, rely upon the same qualification, and the answer fails to show that the release was executed by French to defendants before the plaintiff accepted. There may be a great difference between a release from a liability and the actual rescinding of a contract. If before the plaintiff in this case had accepted of the promises of these defendants to pay that debt to him, French and Brewer and Truscott, had, in fact, rescinded their contract, placing each other in their former conditions, and the agreement was entirely set aside, then it would be a case qualified like that of the 25th Ohio St. In this case the answer does not claim that the contract between French and these defendants had been rescinded. It is conceded in argument that it was after the commencement of this suit that French released these defendants from their liability upon that promise. Now, I think the bringing of the suit was an act of acceptance on the part of this plaintiff and that any right he had already acquired, 349 could not be impaired by French and defendants afterwards, or in any way affect the rights of the plaintiff after he had accepted the promises.

Defendants answer that French owed the plaintiff nothing and they therefore are not bound to pay; that French did not owe anything because his grantor, Mrs. Braundel, was not bound by the stipulations in the deed to her, she being a married woman. It must be borne in mind that the original grantor, George Braundel, did owe this debt, and I do not understand the rule to be that it must be a debt or lien which the immediate grantor of the defendants had originally contracted.

Conceding that Mary Braundel could not have been sued upon that agreement, it is evident that she considered herself at least morally bound to pay it, and as a part of the consideration for the

conveyance, she took care to protect herself against all liability on account of it. She does not seek to avoid her contract. Had she kept the land, she might have paid the incumbrance. French agreed to pay the debt, which would save her from all possible liability, legal, equitable or moral. The defendants agreed to do the same. They agreed to save George Braundel, Mary Braundel and French, from all liability and pay this debt.

Suppose all these grantees are to be considered as sureties or guarantors of George Braundel, it would be no defense by one surety, that another surety might defend, on account of infancy or any other want of capacity, or on the ground of fraud, that is no defense for the others. I think this demurrer to the answer must be sustained.

C. F. Morgan for plaintiff; E. Sowers for defendant.

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**\*ENJOINING EXECUTION.**

[Cuyahoga Common Pleas, 1878.]

HERMAN S. ADAMS ET AL. v. NOAH BOYNTON ET AL.

The sheriff is not a proper party to an action to enjoin the collection of a judgment alleged to be void. Sec. 5015, Rev. Stat., applies only to non-residents of the state, or one who is trying to escape service of summons

CADWELL, J.

This is a motion to dissolve injunction and dismiss petition as against the defendant, John M. Wilcox, sheriff. The petition was filed July 26, 1878. Restraining order granted. Continued to Sept. 9th, and then continued by consent until further order.

The petition sets forth that Noah Boynton was at the time to wit: 12th March, 1878, a resident of Knox county in this state; that he still lives there, and that on the 14th March, 1878, he commenced an action against the plaintiffs, Herman S. Adams, Henry W. Mather, and Byron Fay, in Knox county, before a magistrate, and the summons issued against them returned that they were not found. Then an attachment was issued and certain property levied upon as the property of the plaintiff and the case proceeded to judgment; also that they were non-residents of that county, that the property was valued at \$12.00, and a judgment was finally rendered against the defendants in that action.

The plaintiffs say that they knew nothing about it; that the property attached did not belong to them and never did; that this is one of the sharp practices resorted to in some places for the purpose of getting judgment by fraud.

The plaintiffs in that action filed a transcript in the court of common pleas of Knox county, and then sent an execution up here to the sheriff of this county. The plaintiffs say that they have always been residents of this county and that Noah Boynton was at the time and still is a resident of Knox county.

Now, this petition is filed against Noah Boynton and John M. Wilcox, asking that they may be restrained from the collection of this judgment for the reasons set forth. John M. Wilcox moves the discharge of the injunction, to dissolve so far as he is concerned, the restraining order, and dismiss petition against him, because he is not a proper party, and could not be sued here. We think he is correct in this. The supreme court by repeated decisions prior to 1869 has held that the sheriff is not a proper party in a proceeding to restrain collection of a judgment, he having an execution in his hands; that the execution creditor was the proper party. The legislature, then on the 11th March 1859, passed an act which was in force until the new code was adopted in September last, and that provides "That whenever a party to a judgment seeks to enjoin the collector thereof by injunction, and shall make an affidavit that the party sought to be enjoined, is a nonresident of the state, or has left the same to avoid the service of the summons or order of injunction, or \*so conceals himself that process cannot be served upon him, the sheriff or other officer 353 having in his hands the execution issued on such judgment, may be made a party defendant to the action; and the action may be brought in the county in which such officer resides. And in all such cases the party to the judgment sought to be enjoined, and upon whom actual service cannot be made, may be served by publication of notice in the manner prescribed by sections 71 and 72 of the act to which this is supplementary."

This is the law that was in force at the time this petition was filed. It has been amended by the present code; which took effect on the first day of September last.

In this case no affidavit is filed making any such showing, but directly the contrary is shown. The petition avers positively that the judgment creditor, that is the person in whose interest the execution was issued, was at the time, a resident of Knox county within this state. There is no claim whatever by affidavit or otherwise, that he left the state for the purpose of avoiding the service of a summons or order of injunction or that he concealed himself so that process could not be served. Prior to the passage of this act, under the decision of the supreme court the sheriff was not a proper party at all. This act provided special cases wherein he could be made a party; but this is not one of those cases.

The restraining order is dissolved; the action is dismissed so far as the sheriff is concerned.

John W. Heisley for plaintiff; Estep & Squire for defendant John M. Wilcox.

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**\*PLEADING—LIMITATION OF ACTIONS.**

[Cuyahoga Common Pleas, 1878.]

**ROBERT A. DAVIDSON v. WM. C. HALL.**

Where it is alleged that a person received goods and agreed to account for them, or for their proceeds, but that he appropriated them and refused to account is on a contract to account and not in tort, and a plea of four years' limitation is bad, but as to other goods taken without consent, a plea of four years' time is good.

CADWELL, J.

This is a demurrer by the plaintiff to the defendant's second defense to the first cause of action, and a demurrer to the defendant's second defense to the second cause of action.

The first cause of action stated in plea. That first cause of action is that the defendant received from the plaintiff a certain number of beer barrels, and agreed to account for them to the plaintiff; that the barrels were the personal property of the plaintiff and that he is still the owner thereof; that when the defendant took possession of said barrels, he agreed that in a reasonable time he would return said barrels to the plaintiff, or that if he should sell or dispose of said barrels or packages, he would make a just and fair return of all the moneys so received within a reasonable time after receiving the same. The plaintiff avers that the said defendant has appropriated the said barrels or packages to his own use and refuses to account for or settle with the said plaintiff for the same although oftentimes demanded so to do. That the sum of \$1,600 is now due the plaintiff from the defendant.

To that the defendant interposes, first, this answer; that he denies each and every allegation in the first cause of action in said petition contained; and second that if plaintiff had any cause of action against the defendant by reason of any diversion or appropriation by the defendant of the property described in the first cause of action, said cause of action did not accrue to the plaintiff against the defendant within four years, next before the commencement of the action.

That, it seems to me is not a good defense, as the action is not for a tort, but it is under an agreement to account for, and pay over the value of the barrels. It is really a suit to recover the value of the barrels sold and passed over into the hands of the defendant for which he was to account; so that the action certainly could not be barred in four years; but being a contract, according to the averments of the petition, even if not in writing, it could not be barred in less than six years. It is not an action for a tort which would be barred by the statute on the ground that it had not been commenced within four years; but is clearly an action upon a contract, and we think that the demurrer to the second defense to the first cause of action should be sustained.

For a second cause of action the plaintiff says that at the time first above mentioned in said first cause of action, defendant took possession of one hundred barrels or packages of stock ale, which was in barrels of said plaintiff, which stock ale was worth \$10 each barrel or package, amounting in all to the sum of \$1,000, which ale aforesaid the defendant took possession of without the consent or knowledge at the time of such taking and appropriation of the same to his use and refuses to account or settle with said plaintiff, although often requested; that said sum of \$1,000 is now due with interest. This is the averment, that the defendant committed a wrong, and was a trespasser, and that he took those barrels without the knowledge or consent of the plaintiff and appropriated them to his own use. The petition is not well drawn, because it does not aver that he has demanded the specific property; but there is no demurrer to the petition. We think the fair and liberal construction which we would be obliged to place upon it, under the rules prescribed by the code, would be that it was an action for a tort—a wrongful taking of these barrels. To that, the answer is, that if the plaintiff had any cause of action against the defendant by reason of such diversion, it did not accrue within four years. An action for a tort, an action for a trespass, for a wrongful taking of personal property, must be brought within four years. We think the allegations contained in the petition would show that it is simply an action for a tort, so far as the second cause of action is concerned, and that the plea that the cause of action did not accrue within four years is good.

The demurrer is overruled to that defense.

R. A. Davidson; Bolton & Terrell.

### **\*MALPRACTICE OF ATTORNEY.**

I

[Cuyahoga Common Pleas, May Term, 1878.]

STATE OF OHIO V. LUCIUS B. EAGER.

CALDWELL, J.

It is misconduct in office, such as warrants the suspension of an attorney from practice, to compound a misdemeanor.

### **LANDLORD AND TENANT—FIXTURES.**

[Cuyahoga Common Pleas, May Term, 1878.]

R. F. PAINE, v. F. W. COFFIN.

1. Nonpayment of rent does not *ipso facto* end the term, but the tenant can remove fixtures if he is in possession.
2. Partitions, platforms, tables and furnace registers are fixtures and can not be removed; but the portable furnace connected only by pipes to the registers, counters nailed to the floor, shelving and drawers, are chattels and are removable.

HAMILTON, J.

This is an action brought by the plaintiff to recover upon a certain lease for certain back rent claimed to be due. The lessor

asks that a temporary injunction may be granted against the defendant upon the ground that he is about to remove certain fixtures from the premises. It seems that the premises were occupied by the defendant as a store-room under a lease which was to continue for the period of three years. The conditions of the lease were, in substance that the defendant, the lessee, was to occupy the premises for six months, and at the end of six months was to pay three hundred dollars, the rental upon the lease being six hundred dollars per year, and thereafter fifty dollars per month as rent. The plaintiff states that the defendant has paid nothing, and is now threatening to remove the fixtures in the building, consisting of a furnace, also of a partition that has been erected in the building, certain counters, and a frame work for drawers set up along the side of the building, also certain platform tables, as they are termed, and he asks for a restraining order to prevent the defendant from taking them out; says that he has commenced an action of forcible detainer for the purpose of throwing them out; that the defendant is wholly insolvent, that proceedings in bankruptcy have been commenced against him in the United States court; the defendant has forfeited the term of his lease by the non-payment of rent on demand, the stipulations of the lease being that a demand may be made at any time after it becomes due to the same effect as if made at the time of falling due.

2 The answer is a general denial as to \*the taking away of anything. It is further said that there was a mistake made in the execution of the lease; that the copy set out in the petition is not accurate; that instead of paying three hundred dollars April 20th, as back rent, defendant's copy of lease stipulates that it is to be paid as advance rent, the idea being that the lessee was not to pay anything at all for the six months' rent; and the defendant asks for a reformation of the lease in that regard; says that he is ready and willing to pay the rent that is due and has offered to pay it and asks that the plaintiff be enjoined from pursuing his action of forcible detainer.

The reply denies these averments on the part of the defendant—that there was any tender ever made; avers that there was a pretended tender made, but that on plaintiff's offering to take it the defendant withdrew it and refused to pay it and said that he would pay it sometime during the day.

A restraining order was granted upon the application of the plaintiff in this case, and upon the coming in of the answer of the defendant a restraining order was also granted, temporarily, by the consent of the plaintiff in the case, until the case should be heard, upon the defendant's giving bail as requested. This bail was never given, and that is the status of the case at this time. A motion is now made by the defendant to modify this restraining order, and the question arises whether the plaintiff, under the circumstances of the case, has any right whatever to these fixtures in the store.

It was undoubtedly the rule of the common law that anything attached to the freehold in any manner by the tenant became the property of the landlord. This rule has been very much modified by subsequent decisions in favor of the tenant. He is allowed to take away anything that was not designed to become part of the freehold. It is said, however, that whatever right the tenant may have had, before this lease was forfeited, to take away these fixtures, he has no such right now; that a tenant, if he wishes to remove any property that he has put into the premises, must do it during the term of his lease or not at all; that after the expiration of the lease by forfeiture or otherwise, he no longer has any right there, although he may be in possession of the property. The decisions are very diverse upon that proposition. Some of them maintain that it must be done during the term of the lease and that the continued possession would be a wrongful possession unless he had a right to remain, and therefore when the lease was forfeited his term had expired and he would no longer have any right to take it away. The doctrine maintained by other authorities is that the tenant may remove the property at any time so long as he retains possession of the leasehold estate, which proceeds upon the theory that by an abandonment of the premises the property left becomes the property of the landlord.

Thus there are three holdings upon that proposition. I incline to think, however, that so long as the tenant remains in the actual possession of the property—has not vacated—remains there perhaps under question of right, as a suit in this particular case is now pending to determine whether or not that right has been forfeited—the tenant has the right to remove, if the fixtures are of a character which he may remove.

Now as to whether they are fixtures or not as between landlord and tenant is the only remaining question. In the 1st Ohio State, *Teaff v. Hewitt*, the court said: "A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it. The true criterion of a fixture, apart from established usages or special agreement, is the united application of the following requisites, to-wit: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to the use, or purpose, to which that part of the realty with which it is connected, is appropriated. 3. The intention of the party making the annexation, to make a permanent accession to the freehold which intention is determinable from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which it is used, the relation of the party making the annexation and other attending circumstances." All these must combine in order to make a fixture and that is the criterion by which it is to be determined whether a certain thing is or is not a fixture.

In the 22d Ohio State the court uses the following language: "That the mode of annexation alone will not determine the char-

acter of the property annexed is apparent from the fact that property may be annexed by the same mode, and yet be personalty in the one case and realty in the other. Trees growing in a nursery are annexed to the soil in the same way as trees growing in an orchard; but, in the former case, they are cultivated for the purposes of trade and are regarded as personalty, while in the latter, being intended as a permanent accession to the lands, they are regarded as belonging to the realty. The general principal to be kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises or *locus in quo*. The former is personal in its nature and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient."

Now there have been some affidavits, perhaps two or three on each side of this case, showing the character of these fixtures—how permanently they are attached to the freehold. It appears that the furnace in this case is a portable furnace, and was set upon the floor in the basement with pipes leading from it to the floor where there are some two or three registers through which the heated air comes into the store room. The registers are attached. There is no question about those. They should remain. But this portable furnace, having no attachment whatever to the freehold, seems to me to stand in the same position as that of an ordinary stove. It was placed there by the tenant simply for the purpose of transacting his business.

In relation to the partition, that is permanent. It separates one part of the room from the other. This fixture attached to the side of the wall for holding drawers, there is no question but that is a permanent fixture. Some of the counters are set upon the floor, not fastened in any way, and some of them are nailed to the floor. They were there and used simply by the tenant in carrying on his business. The safe is also there. The same may be said of that.

In reference to the platform tables, as they are termed, we think those are permanent. They are attached in a permanent manner—secured to the window, to the floor and to the side of the building, and constructed in such a manner that if taken down they would not be of a particle of use to anybody.

As to this shelving, drawers, etc., as I have said before, they were not designed to be permanently attached to the freehold, and

as a matter of fact are the same as were formerly used by the tenant in the building at the Weddell house from where he removed into this building.

I find that the partitions, platform tables, registers in the floor, are fixtures and cannot be removed; that the counter, shelving drawers and furnace are simply chattels and may be taken away by the tenant. The restraining order will therefore be modified in that particular.



**\* SEPARATION OF WITNESSES.**

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[Cuyahoga Common Pleas, November Term, 1878.]

STANTON V. RUGGLES ET AL.

In the case of Stanton, an infant, by next friend, against Ruggles et al., counsel for defendants, before any testimony was offered, having asked the court to order a separation of the plaintiff's witnesses, the plaintiff was sent out, counsel for the plaintiff having stated that the management of the suit out of court had been solely under the charge of the next friend, and the latter was permitted to remain.

**REFERENCE—CORPORATIONS.**

[Cuyahoga Common Pleas, November Term, 1878.]

GEO. P. BURWELL V. THE HAZARD HAME CO.

1. In order to review exceptions to evidence on a trial had before a referee, a bill of exceptions is necessary, as a trial before a referee, is conducted and reviewed the same as a trial by court.
2. A stockholder who gives his notes to creditors of the corporations at its request, and judgment is had on them, is a creditor, though he has not paid.

CADWELL, J.

This case was heard upon exceptions to the report of a referee. So far as the exceptions taken by Sloss, Rock and Hosmer are concerned, there is nothing for the court to pass upon except that taken by counsel for Sloss to certain questions asked by counsel for Sloss in regard to a conversation had between him and the treasurer or secretary of the company which was objected to and by the referee ruled out, to which there was a bill of exceptions taken. I do not think there is any ground for the exception, but that the referee acted properly in ruling out the evidence. The supreme court has decided repeatedly and the code is explicit on that subject, that a trial before a referee proceeds in all respects as a trial before a court, and there is no way to review his report upon the findings of fact and law, except by taking a bill of exceptions to this court on exceptions to the report. This is a court of error, and stands in the same relation to a referee as the district court to the court of common pleas. There is nothing then that we can act upon in regard to the exceptions taken by Hosmer, Sloss and Rock.

There is one other party, Festus C. Bolton, who takes exceptions to the report of the referee, as to his conclusion from the facts which are all stated in the bill of exceptions, regularly pre-

pared and signed by the referee at the time and made a part of his report; so that I think that is properly before this court and it is simply this question: The referee finds that Bolton, and several

10 others \*whom it is not necessary to name, being stockholders in the Hazard Hame Co., and the Hazard Hame Co. being indebted to certain banks and other persons for liabilities incurred on account of the company—that Bolton, by agreement between the stockholders and with the assent of the First National bank and other banks, in lieu of the indebtedness on these bank notes gave his own individual notes, one for two thousands dollars and the other for four thousand dollars; that they both belonged to the First National bank of Ohio, and that by agreement with the bank and all parties concerned, Festus C. Bolton gave his individual notes, in lieu of and in payment of the original notes, and that these notes were accepted by the banks as payment of the original indebtedness, and the referee was asked to find that Bolton was a creditor of the corporation to the extent of that liability, further finding that when those notes of Bolton became due suits were brought upon them and judgment recovered against him. The referee found, however, that he was not entitled to stand in the relation of creditor for the reason that he had not in fact paid those judgments. In that respect I think the referee was wrong, for if the original indebtedness was actually paid off, Bolton paid for the corporation the debt of the corporation at the request of the corporation, and it may be implied although the bill of exceptions does not state specifically that it was at the request of the corporation, yet it was at a meeting of the stockholders of the corporation and the bank accepted. It is fair to infer that if it could have any knowledge of that fact, and it was done at the request of the corporation, then the old indebtedness of the corporation had been extinguished, and Bolton by assuming to pay their liabilities by giving his own notes, which were received in payment, we think did pay that debt to the corporation, and that thereby he became a creditor of the corporation. This, of course, could have no other effect.

It was argued to some extent that he having paid that debt, that he should have the privilege of setting off against his individual liability as a stockholder the amount of this indebtedness which he had assumed. But we do not think that that position is tenable, and that it would not be a fair thing to have this record stand in the way it does by the report of the referee, forever barring him from placing himself, should it become necessary, in the position of a creditor of the corporation. And for this reason the exceptions taken by Festus C. Bolton are sustained and the report of the referee is set aside in the respect that it finds that he is not a creditor of the corporation.

Ford, P. P., W. J. Hudson for defendant; D. W. Gage for plaintiff.

**EJECTMENT—LAND CONTRACT—PETITION.**

[Cuyahoga Common Pleas, November Term, 1878.]

†JANS ZOETER V. A. W. LAMSON.

1. Whether an action of ejectment may be maintained by the owner of the legal title as against a defendant in possession by virtue of a land contract, rescinded by the plaintiff, query.
2. A petition in such a case which does not aver that the plaintiff has complied with the terms of the contract on his part is defective.—[ED. LAW REPORTER.]

CADWELL, J.

This is a demurrer to the answer and is rather a novel proceeding. The action purports to be for the recovery of real property, or what would be considered an action of ejectment and for the use and occupation of the premises after a certain time. I have never known in my experience, under the code, of an action of this kind being brought under such circumstances. The plaintiff says that he is seized in fee of the following lands, and that defendant unlawfully keeps plaintiff out of possession; and there is the further averment that the defendant entered into possession under a contract of purchase, but for three years past has utterly neglected to comply with the terms of payment of the whole amount of the purchase price; that four annual payments have fallen due and unpaid; that on or about the 14th day of October, 1878, the plaintiff notified the defendant of the rescision of said contract and demanded possession of said premises.

For a second cause of action the plaintiff says that the defendant entered into possession unlawfully withholding to his damage in the sum of three hundred dollars, and asks judgment for the recovery of the possession of the property, and for a lien.

There is nothing whatever stated in the petition as to what the terms of that contract were. It was under a contract of purchase he says. There is no averment in the petition that the plaintiff has ever complied with any of the terms and conditions of that contract, but says that he rescinded the contract on a certain day and gave the party notice.

Now the defendant, by his answer and cross-petition, says that he admits that the plaintiff holds the legal title to the premises and that he entered into possession of the premises by virtue of the contract of purchase, and he admits that plaintiff on the 14th of October, 1878, notified this defendant that he had rescinded said contract. He further says that on the 8th day of October, 1874, the defendant entered into an agreement in writing

†Affirmed by supreme court in *Lamson v. Zoeter*, without report. 11 Bull., 327. No account of decision of district court is found in C. L. R.

with the plaintiff, of which the following is a copy: "Agreement entered into this 8th day of October, 1874, between Jan Zoeter and A. W. Lamson, whereby said Jan Zoeter this day agrees to sell to A. W. Lamson a certain house and lot situated upon the south side of Superior street between Norwood street and Denham avenue, being the first lot east"—and so on, describing the property.

Then follows: "Said house being now in course of erection and completion, said house to be finished in every respect by said Zoeter in a good workmanlike manner, with inside walk and fences, well and cistern, lot graded and sodded, and barn, all to be conveyed to said Lamson by a good warranty deed free of incumbrances when finished. Said A. W. Lamson agrees to pay the said Zoeter for the same the sum of \$8,000, \$2,000 down, the balance \$6,000 in four equal annual payments, secured by a mortgage on said premises, and at 7 per cent. interest; said payments to bear date the day when possession is given of said Lamson. This contract is subject to verbal arrangements between the parties as to the manner of finishing said house. Now the defendant goes on and says that after the house was completed, he did pay the \$2,000 and a little over a thousand dollars more within a few days thereafter, and he says that previous to the time of taking possession of the premises, the defendant had paid to the plaintiff the full amount of said down payment of \$2,000, and, on or about the date said house was completed to wit: the 15th of December, he prepared a mortgage deed to be executed by himself to the plaintiff to secure the deferred payments provided for in the contract, and that up to the time when the house was finished, he had fully performed all of said contract on his part to be performed, and that it then became the duty of the plaintiff, under and by reason of the terms of said contract, to free said premises from all incumbrances and then and there to convey the same

11 to this defendant \*by a good warranty deed; that the defendant then and there prepared a warranty deed of the premises from the plaintiff, in due form, and requested him to execute and deliver the same to the defendant and then there informed the plaintiff that he was ready to execute and deliver to the plaintiff a mortgage to secure the deferred payments. He says that at the time the house was finished and possession of the same given to this defendant, there was an incumbrance on the premises, a mortgage lien, which was then a valid lien on the premises, and which remained and continued to be a valid lien on the premises for more than two years thereafter until on or about the second day of June, 1877; that since that date when said house was finished down until the second day of June, 1877, the plaintiff disregarding the conditions of said contract on his part to be performed, failed and neglected to have said premises freed of the incumbrance thereon. Then he goes on to set forth that he paid in all, the sum of \$2,942.25 on the premises, showing that the defendant himself was entirely in default; that he had never tendered him the deed

as he had stipulated in his contract. There is no averment contained in the petition to show that he had. The petition itself would be demurrable because the pleader has not set forth that he has performed all the conditions of the contract upon his part to be performed. I do not undertake to say whether an action in ejectment could be maintained under circumstances like this; but it certainly never could until the plaintiff had performed all the conditions upon his part. I have not examined the statute. Formerly, before the adoption of the code, a party who held a mortgage upon premises might commence an ejectment suit to turn the mortgagor out upon a breach of the conditions of the mortgage. That certainly cannot be done now; but he must foreclose his mortgage, and we think, in a case of this kind the rule ought to be that the party should stand in the same relation to his grantee under a written land contract that a mortgagor and mortgagee would stand. However, I do not undertake to pass upon that question.

Now, here is a demurrer also to that part of the defense set forth in what is called the cross petition. Now, if the plaintiff has rescinded the contract without complying with or offering to comply with or being in a condition to comply with the terms and conditions of that contract, and turns the party out of possession, he must make him good; he cannot rescind the contract while he is in default, unless he places the other party in as good a condition as he was before. He is bound to pay for all the improvements and repay all the purchase money paid to him.

The demurrer to this answer and cross-petition is overruled.

E. D. Starke for plaintiff; Pennewell & Lamson for defendant.

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### \* FREIGHT DISCRIMINATION—PENALTY—LIMITATIONS. 19

[Cuyahoga Common Pleas, January Term, 1878.]

#### CRAWFORD ET AL. V. THE PENNSYLVANIA CO.

An action for a penalty against a foreign railway which operates a domestic road is not saved from the one-year bar of the statute of limitations by its non-residence, unless it is shown to be a lessee which has taken all the statutory steps entitling it to sue and be sued as a domestic corporation

JONES. J.

This is an action brought for the plaintiffs to recover about \$160,000 of the defendant, which is a foreign corporation operating certain other railroads in Ohio, by reason of certain alleged excessive charges (running through a series of years, from 1871 to 1875) on the transportation of coal for plaintiffs from Clinton Station, and other points, which are claimed to be violations of the statutes of 1871 and of 1872, amendatory thereof, to be found in volume 68, page 78, and volume 69, page 27, Ohio Laws.

The petition in this case is very voluminous, and contains

some five or six hundred causes of action for as many alleged separate and distinct violations of the statute.

The defendant demurs to each and every one of said alleged causes of action, except the 257th and 258th, on the grounds that the petition does not contain facts sufficient to constitute a cause of action; and for the reason that on the face of the petition each and every one of said causes of action is barred by the statutes of limitation.

On the oral argument of this demurrer two things seemed to be substantially agreed upon by the counsel on both sides, to wit:

1. That the petition contained such averments that the plaintiffs' right to recover depended upon whether the proper construction of the statute in question was the one given to it by the plaintiffs or the one given to it by the defendant and his counsel; the plaintiffs insisting that the effect of the statute was to prevent any greater rate of charge by any railroad company for transportation per ton and per mile for a short distance, than for a long distance, or, in other words, that it requires such companies to charge a uniform rate per mile for long or short distances for the same kind of freight carried in the same direction. On the other hand, defendant's counsel insist that the statute was penal in its character, and that it should be strictly construed, and that the effect of it was only to prohibit them from charging a larger sum for transporting property any particular distance than it does for the same property in the same direction for an equal or greater distance, but that the statute does not establish a uniform rate per mile, and does not prevent a railroad company from charging the same price for a short distance as it does for a longer one.

2. It seemed to be conceded on the hearing that the plaintiff's petition showed that the defendant, the Pennsylvania company, was the lessee, under and by virtue of the act of March 19, 1869, vol. 69, page 32, O. L., of the various railroads it was operating in carrying the said coal of the plaintiffs, in regard to which the discrimination and overcharge is alleged. But on a careful examination of the various allegations of the petition, I do not think that either of the facts apparently conceded by counsel are therein set forth.

In other words, I think there are allegations in the plaintiff's petition which are broad enough, if proven, to entitle them to recover under the statute whichever construction is to be given to it. For the petition does contain a statement that the defendant charged a certain sum per ton, for, say fifty-four miles from Clinton Station to Cleveland, being more by so many dollars than it charged certain other persons and corporations named for freight of same kind for an equal or greater distance, and more than it charged various named persons for certain greater distances named in the petition. This being the case I cannot hold that the plaintiffs' case, as made in their petition, is not within the provisions of the statute; and it also obviates the necessity of at present decid-

ing whether the plaintiffs' or the defendant's construction of the statute is the correct one. If, however, both parties are willing to stipulate that the petition may stand or fall upon their respective constructions of the statute, I will pass at once on its construction, as I have examined it carefully and made up my mind in regard to it.

3. This action being for the recovery of a *penalty* imposed by a statute, is barred by the statute of limitations one year from the time the cause of action occurred, unless the statute was prevented from running under section 21 of same statute, by reason of the absence from the state of the said defendant a foreign corporation.

The defendants insist that by a certain statute passed March 16, 1868, foreign railroad companies are authorized to lease certain other connecting lines of railroad or enter into an arrangement for their common benefit, provided it is sanctioned by two-third of the stockholders of the road to be leased at a meeting called for that purpose, and that when this is accomplished the lessor may sue and be sued in all cases for the same causes and in the same manner as a corporation of this state might be if operating its own road.

They further insist that such foreign corporation so leasing roads within the state, is required by statute to maintain an office on the line of the road so leased where legal process can be at all times served on it; and that by reason of these provisions the defendant, though a foreign corporation, was not absent from the state nor for a single moment without the jurisdiction of its courts or beyond its control from the time of the contraction of the liability to the plaintiffs, if any there was, up to the time this suit was begun in this court.

But I hold that this point cannot be fairly made or decided on this hearing, for the reason that it does not appear in the petition that the Pennsylvania company ever leased any of the roads in question, or any other roads in the state of Ohio, or that it ever acted under said statute in any way, or that the stockholders of any such leased roads ever ratified or assented to any arrangement under said statute, or that said defendant ever established an office for the service of process on the line of said leased roads, as required by the statutes. The allegation in the petition that defendant was "running, contributing and operating" said road is not sufficient to show that it was acting under said statute. The point here sought to be made is a new and interesting one under the laws of this state. I think, however, that it does not arise in the case at present. I, therefore, on the whole matter, hold that the petition does contain facts enough to constitute a cause of action, and that there is nothing at present in the petition to show that the running of the statute of limitation has not been prevented by reason of the absence of the defendant as a non-resident corporation.

The demurrer of the defendant to the plaintiffs' petition is therefore overruled.

The defendant excepted and was given leave to answer by February 10th.

Judge J. P. Bishop, for plaintiff; and Ranney, for defense.

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## \* ATTORNEY—DISBARRMENT.

[Cuyahoga Common Pleas, November Term, 1878.]

STATE OF OHIO V. O. H. BENTLEY.

An attorney may be disbarred for misconduct, not necessarily misconduct as an attorney, otherwise the court could not disbar for crime, but there must be misconduct, and hence bad motive must be charged, and if the information is consistent with proper motives it is demurrable.

CADWELL, J.

After a careful consideration of the information in this case, I am satisfied that it cannot be sustained, simply upon the ground that it does not show misconduct, and therefore does not show good cause. There is no bad motive charged, nothing charged as that it was done by way of revenge, mischief, to extort money or anything else of that kind. I hold, and have already held in one other case, that it is not necessary to charge that the defendant committed a crime, nor that the act was done while acting in the capacity of an attorney, but that in order to make "good cause" under the general terms used by the statute "for misconduct in office or for good cause shown," there must be misconduct, not necessarily misconduct as an attorney, because, if it is misconduct as an attorney simply, a man might be guilty of all manner of crimes and the court could not disbar him. Now, in regard to this information, it contains a single count and paragraph. "For cause first, that on or about the 24th day of May, 1878, the said O. H. Bentley aided and assisted in procuring one Phillip Godletter to sign and make oath to an affidavit wherein one——— was charged with the commission of a crime when the said Bentley well knew that the said Godletter"—that is, the person who signed the affidavit, for it does not state whom he aided and assisted. It does not state what crime —— was charged with. Perhaps that would not be necessary,— "when the said Bentley well knew that the said Godletter did not know the person charged with the offense." That is the first accusation. Would it be misconduct on the part of an attorney if a man comes to him and says, "Now, I have been informed that a crime  
28 has been \*committed upon the street. I wish you to draw an affidavit. I don't know it myself, but I have been informed that such is the fact, and it is necessary to take immediate steps to arrest the party;" and the attorney draws the affidavit? The person applying to him says, "I don't know the fact myself," but he makes the usual affidavit and swears that a crime has been



committed "as he verily believes." I can see nothing wrong in that. It is a thing that is done repeatedly, frequently and properly, so far as I am able to discover.

But a further accusation is, that he did not know the person charged with the offense, and that he knew nothing whatever of the alleged offense. That might all be, under what I have already said. This person might come in—say a crime of robbery has been committed upon the street, assault and battery, murder, anything of that kind, and say to the attorney, "I do not know any of these facts, but it is reported to me that such has been the case; I do not know the man—designate him as John Doe—or do not know the fact, but I verily believe a crime has been committed." Would there be anything wrong in any attorney drawing an affidavit in that way? I am unable to see wherein there would be any misconduct on the part of an attorney or anybody else in thus drawing an affidavit, or assisting in having it done or in procuring the party who thus gave the information to the attorney to assist him in procuring the affidavit.

Now, there is nothing in this information which would negative the idea that exactly that state of facts might exist. It further avers, "and that he did not understand the language in which it was written." That Bentley knew that this person that made the affidavit did not know the person that had committed the crime, did not know the facts in relation to the crime, and did not understand the language in which the affidavit was written. That all may be. He may be a German; he may be a Bohemian, a Frenchman, any other nationality. The affidavit may be written in English and the person making the affidavit may not understand the English language, but there is nothing in this information to negative the idea that the contents of the affidavit were made known to the person who made the affidavit in a language which he did understand. He may have had an interpreter to interpret it in a language which he did understand. [Reads.] "All of which facts, as aforesaid, the said O. H. Bentley well knew"—suppose he knew all of those facts, it cannot be said that he is guilty of any misconduct—anything improper, so far as I am able to discover, "when he so aided and assisted in procuring said Godletter to sign and make oath to said affidavit, and also that the said O. H. Bentley well knew at the time aforesaid that the person so charged had been once arrested for the same offense and duly discharged therefrom." Persons are frequently arrested charged with an offense, examined before a magistrate and duly discharged. But there is nothing in the statute that prevents any other person making an affidavit and causing his arrest again. Nor can I see anything improper in an attorney making an affidavit for a person who wishes to make complaint when he knows that that person has been arrested once and discharged. If it had been charged that he made this affidavit when he knew that this person had been arrested and tried for the offense and acquitted, and that therefore

would know that he could not be held to answer again, that would charge misconduct; but there is nothing of the kind in the information. Had it been charged that he knew that no crime had been committed on the first part it would have charged him with misconduct. Had it been charged that he knew that the person making the affidavit knew that there was no such person or that no such offense had been committed, it then would have charged him with misconduct. Had it been charged that the affidavit was made in a language which Bentley knew that the affiant did not understand, and that the contents were not made known to him in a language that he could understand, then it would have charged Bentley with misconduct. But none of these things appear. And I cannot see wherein there is any misconduct alleged against the defendant in this case. For that reason the demurrer will be sustained.

John C. Hutchins, for the state; A. M. Jackson, for defendant.

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**\*CHAMPERTY.**

[Cuyahoga Common Pleas, January Term, 1879.]

FORD V. HOLDEN.

The defendant sought to show by the cross-examination of the plaintiff (the action having been brought to rescind a contract for the sale of certain mining stock by the plaintiff to defendant upon the ground of fraud), that since the commencement of the action the plaintiff had entered into certain champertous contracts under which the parties with whom the plaintiff made the same were to furnish means for the continued prosecution of the plaintiff's action, and to share in the proceeds of any recovery that might be had therein by the plaintiff. *Held:*

1. That it was not a proper subject of cross-examination.
2. That the making of such champertous contracts by the plaintiff did not constitute any defense on behalf of the defendant to the plaintiff's claim, and therefore furnished no ground for a dismissal of the action.

PRENTISS, J.

The question to which objection was taken by the counsel for the plaintiff was put to the plaintiff on his cross-examination by the defendant. The question sought to draw out the fact that after the institution of this action he had entered into a champertous agreement with Eells, Bolton and Harris for the continued prosecution of this action. The plaintiff did not testify at all in respect to this alleged champertous agreement. It was no part of his case to prove or disprove this champertous agreement.

The first inquiry is, then, whether or not, under any rule of cross-examination, the inquiry could be made of this plaintiff. It is said it may be made for the purpose of showing the interest of this plaintiff in the suit; for the purpose of showing the feel-

ings of this plaintiff towards the defendant; for the purpose of showing that in the original inception and in the continued prosecution of this suit, this plaintiff is influenced by passion or prejudice, by hostile and unfriendly feelings towards the defendant. This alleged champertous agreement (there are three of them perhaps) has been submitted to the court, and the court has read it.

So far as the first ground or reason on which it is claimed that this inquiry may be made of this witness is concerned—as to having a tendency to show interest in the event of this suit—that interest is clearly manifest. It is perfectly apparent without any proof of this kind. The witness is the plaintiff in the action. He is prosecuting a claim which he insists he has against this defendant. And proof of this alleged champertous agreement would show no larger interest in this plaintiff than is perfectly apparent from the fact of his being the plaintiff in the action. If it has any tendency to show the extent of his interest in this action its tendency would be to show that he had a lesser interest than would be apparent or obvious from the fact that he is the plaintiff in this \*suit;—that he has parted to Eells, to Bolton and to 34 Harris with some portion of that interest; and instead of such proof affecting on that ground, the credibility of the testimony of the plaintiff, it would have a directly opposite effect, if the extent of the interest of a party in a suit affects at all his credibility on the ground of its being larger or smaller in the controversy. Testimony is not wanted for that purpose, inasmuch as there is abundant testimony in the admitted facts of the case aside from that.

Then is it competent for the purpose of showing the feelings which influence the plaintiff in the prosecution of this action? What do the contracts show? They show simply that he has made some arrangement with other parties who have claims of perhaps the same character as those which this plaintiff is prosecuting in this action, by which he has acquired some interest in those claims. But whatever interest he may have acquired in those claims is not a subject matter of inquiry in this suit, inasmuch as those other claims are not being litigated in this action.

But how does it evince any unkind, unfriendly or hostile feeling, or any passion or prejudice on the part of this plaintiff, that he has made an arrangement by which he has acquired an interest from other persons in claims of a similar character? I do not think that fact has any sort of tendency to show anything of the character for which these contracts are sought to be introduced in this action. So I do not think that this cross examination is a proper cross examination of this plaintiff upon the grounds upon which it is assumed to be a proper cross examination of the plaintiff.

Then is there any other ground upon which this cross examination is permissible? Now the one other ground upon which this cross examination may be permissible is this: That under a decision of the supreme court of this state, notwithstanding there is

no examination of the witness by the party calling him in respect to a matter, it is proper for the opposite party to inquire of the witness in respect to any facts which the party calling him is required to prove in order to sustain his claim. Now the plaintiff, in respect to the making of these alleged champertous contracts is under no sort of obligation growing out of anything thus far appearing in the case to make any proof in regard to them.

So that in my judgment the rule established by the supreme court will not make the cross examination of this plaintiff competent in this case. I do not think then the inquiry which is proposed to be made of this witness upon cross examination can be made.

• But it is said that this is competent because upon its being made known in any form or manner to the court that these alleged champertous contracts existed—if they are actually champertous contracts—the court ought to compel a dismissal by the plaintiff of this action, if the plaintiff would not voluntarily dismiss the action. That involves the question whether or not it is competent in this case for this defendant to prove, as a matter of independent proof, the fact of the making of these contracts. It is not necessary for me at this time to dispose of that question, but inasmuch as the question has been fully argued by counsel, it may be expected by them that I shall dispose of it, and perhaps it is as well at this time to dispose of that question. The contracts, it is said, are not only objectionable upon the ground of their being champertous contracts, but objectionable upon the ground that they show a conspiracy on the part of the parties to these contracts, to oppress, to wrong, and to injure the defendant, and the court, whenever such a disposition is manifested by a party—proved to exist in a party—ought not, by any act that it may do, sustain or approve such a purpose or such a disposition on the part of the party who evinces any such purpose or disposition.

Now, in the first place, it is said by the defendant's attorney that this is not a defense to this claim; that even if the conspiracy existed, or even if the champertous contracts existed, they constitute no defense to the plaintiff's claim. If they constitute no defense to the plaintiff's claim, I do not see how it is proper for the defendant to make proof of these facts. Assuredly upon the ground, and only upon the ground, that they constitute a defense to this action, can such proof be made by the defendant as independent proof. If they amount to anything as affecting this action, they constitute a defense to the action, it seems to me. They constitute a defense for the purpose of disposing of this action. It is claimed on the part of the defendant here, that these facts being made known to the court, the court ought upon those facts to dispose of this action; and if the court ought to dispose of this action upon the existence of those facts being in proper form made known to the court, it seems to me to that extent—to the extent of the disposition of this action, they must necessarily and inevitably constitute a defense to the action. If they constitute no defense what-

ever to the action, then I do not think that the court has anything whatever to do with proof of them. It is said that they constitute no defense, and when they are made known to the court, the court ought to compel the dismissal of the action by the plaintiff, or ought to dismiss it itself.

Now how is it possible that these champertous contracts can be any objection to the further prosecution of this claim asserted by the plaintiff in this action. The claim is not founded at all upon any champertous contracts, not founded upon any conspiracy at all. It existed anterior to the making of this champertous contract and this conspiracy, and wholly independent of them. It is not sought, through or under this conspiracy or these champertous contracts, to recover anything in this action of the defendant; but upon a pre-existing and original claim in favor of the plaintiff against this defendant this recovery is sought. Now suppose that these contracts are champertous, and suppose that they are justly amenable to the criticism that there was a conspiracy formed by and through them—assuming all these facts, do these facts make any sort of defense either equitable or legal, to the recovery of that pre-existing and independent claim? I cannot see how it is possible that it can affect the claim. It existed wholly independent of it, and anterior to it, and I do not think myself that because of the existence of these alleged champertous contracts that the plaintiff is obliged to go out of court and to remain out of court until those champertous contracts are abrogated by and between the parties to them. Certainly that view of the case is sustained by several decisions; in Massachusetts, in New York, and one decision in England in which the courts have said and decided that a champertous contract, although illegal, could not affect at all a legal cause of action which existed in favor of the plaintiff against the defendant. It was no ground whatever of defense to that cause of action, and in no one of those cases referred to by counsel for defendant has the court undertaken to assume that it would be proper, because of the alleged champertous contracts, to compel the plaintiffs in those actions to dismiss the actions or to dismiss them itself. Now, it seems to me it would be very strange, where those contracts in all those cases were acknowledged to be champertous contracts, to be absolutely \*null and void, 35 giving no rights to either party whatever—it seems to me it would be strange if they could affect the right of the plaintiff in those cases, to prosecute the action which was commenced, perhaps, in some instances or subsequently prosecuted, because of the existence of those champertous contracts. The courts have intimated nowhere that they would interfere with the prosecution of those actions by reason of them. Now it is said here that if the court does not thus dispose of this action, it will be aiding in the enforcement of these champertous contracts. It seems to me, that the court does not furnish any aid whatever to those champertous contracts in the

way of enforcing them by allowing the plaintiff to prosecute this suit. Those champertous contracts are absolutely void because they are champertous and no obligation grows out of them on the part of this plaintiff or exists because of them to the parties with whom they were made, so that the court is not called upon to enforce them. It does nothing in the way of enforcing them. It leaves the parties just exactly where they would have stood if these advances had been made without any champertous agreement. So far as the plaintiff is concerned in reference to making compensation to some person who furnished him aid for the purpose of the prosecution of the suit, he is at liberty if he chooses to do so to perform this contract, but because of the existence of the contract he is under no sort of obligation to perform, it being illegal and void.

Now how can it be said that the court furnishes any aid in the way of enforcing this contract by simply refusing to determine that the plaintiff shall go out of court because of the existence of it? It is a contract that is absolutely void under which nobody has any rights whatever. Now if that suit should result in favor of the plaintiff, he may if he chooses, do what he has a mind to, notwithstanding that contract, with the recovery which may be had in this action. He may give it to the parties with whom he has made the contract, or he may withhold it from the parties with whom he has made this contract. This contract does not impose upon him any sort of obligation whatever, and the court is not in any way, it seems to me, under such circumstances, by refusing to dismiss this action, aiding any of the parties to that contract in respect to the claims which apparently exist under the contract, but do not in law or in equity exist under it. That is the view which I entertain of the question which has been made in this case. And, it seems to me, that the testimony is not proper, either as independent proof on the part of the defendant or by way of cross examination can it come into this case of the plaintiff. I sustain then the objection to the testimony.

Judge Tyler: I don't understand the court in its illustrations to pronounce or determine that the contracts are champertous or not.

The Court: I have not undertaken to say, but I have a very decided opinion in reference to the character of this Eells contract.

**\*RAILROADS—CONSTITUTIONAL LAW.**

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[Cuyahoga Common Pleas, January Term, 1879.]

**GEORGE GAUSE v. THE L. S. & M. S. R. R. CO.**

1. The act of May 4th, 1869, requiring railroads to use certain kinds of heating apparatus so constructed that it will extinguish the fire when the cars are overturned, is not unconstitutional.
2. The act should not be so construed as to destroy its force as a remedial and preventive statute.
3. Under said statute a common informer, though entitled to one half the penalty, cannot maintain the action in his own name, but that action must be brought in the name of the state of Ohio.

JONES, J.

This is what is known in law as a *qui tam* action, and is brought by an informer, to recover the penalty provided by the act of May 4, 1869, entitled:

"An act to protect more effectually the lives of railroad passengers from casualties by fire."

Section 1 of said act is as follows:

"That each railroad company in this state shall, when necessary to heat any of its cars, do so by heating apparatus so constructed that the fire in it will be immediately extinguished whenever the cars are thrown from the track and overturned; and it shall be unlawful, for any railroad company in this state to allow any other railroad company or persons, to run any cars upon its roads, unless the heating apparatus in such cars conforms to the requirements herein prescribed."

Section 4 of the same act provides, "That every railroad company violating the provisions of this act shall be liable to a *forfeiture* of not more than five hundred dollars nor less than one hundred dollars, to be recovered in an action of debt *upon the complaint* of any person before a justice of the peace in any county in which such violation may occur; one half of the penalty shall go to the complainant and the other half to the state of Ohio for the benefit of common schools."

The petition of the plaintiff avers substantially, that on the 5th of April, 1877, the defendant was a duly organized corporation, under the laws of the state of Ohio; and was then and there owning, running and operating its railroad running from Buffalo through Cleveland to Toledo; that on said date, it became necessary to heat certain of its passenger cars, to wit: Nos. 7, 66, and 85, while carrying passengers over said road and within Cuyahoga county; and that at said time and place it did not heat its said cars with apparatus so constructed, that the fire would be immediately extinguished if the cars should be thrown from the track and overturned, but did heat such cars and each of them by an ordinary wood stove. He prays a judgment for five hundred dollars as provided by the statute.

The defendant demurs to this petition for the reasons following:

1st. That it does not state facts sufficient to constitute a cause of action.

2d. That there is a defect of parties plaintiff in the action.

On the argument of the demurrer it is insisted on the part of the defendant,

1st. That the statute in question is not one the state has any power to make.

2d. That the statute should be construed that there can be no violation of it and penalty incurred by a railroad company merely refusing to comply with the law, but there must also have an accident actually occurred in which the apparatus did not actually extinguish the fire.

3d. That the petition in the case is defective in not setting forth that *there was in existence* and *accessible* to defendant, at the date in question an apparatus so constructed that it would comply with the requirements of the statute in question.

4th. That the plaintiff is not the proper person to bring the suit.

The statute above quoted, though highly penal in its character and therefore strictly to be construed, so far as the recovery of the penalty is concerned, has for its avowed object the protection of railroad passengers from fire while traveling on railroads. I think there can be no doubt of the full power and authority of the state to enact any reasonable rules and regulations, that will accomplish this purpose, or which have a tendency to increase the safety of operating or traveling on such means of conveyance. Railroads are great public necessities, and managers thereof should be held by the law making power to a high degree of diligence, in fully and safely subserving the purposes for which they are created.

In hearing this demurrer the wisdom and propriety of this legislation to accomplish the purpose will be presumed.

The object of the statute is *clearly not* merely to *punish* a *wrong* after it has been perpetrated, but it is *\*remedial* in its nature and is intended to *prevent* the happening of accidents by means of fire.

I cannot therefore accept the construction of the statute sought to be given to it by the defendant in the case to wit: that defendant is not liable to any penalty until the cars have been actually overturned, without the apparatus provided having extinguished the fire. To give this construction to the statute would be to destroy its whole force and effect as a remedial statute, and it would utterly fail to subserve the purpose intended. Accidents of the exact kind described are ordinarily of such rare occurrence that it would be cheaper for a railroad company when one occurred, to pay the penalty provided by law, than it would be to furnish and equip all its cars with apparatus such as is described in the statute.

I do not think it necessary here to decide the proposition as to



whether the petition should show that such an apparatus was in existence and available to defendant or not, as another proposition in the case is to my mind conclusive in deciding the rights of this plaintiff. I will proceed to consider then the question whether this plaintiff can himself maintain this action. Although there are many *penal* statutes in Ohio there is a remarkable absence of authority on any questions pertaining thereto, and especially on this particular question.

But there are a large number of authorities in other states which hold with almost unvarying unanimity, that where a penalty is given by a statute, either in whole or in part, to an informer, that he cannot for that reason maintain the action; but can only do so when he is *expressly authorized* by the statute to maintain the action in his own name, and this evidently so on principle, as well as authority. The state *makes* the law, *creates* the penalty, *owns* and *enforces* the collection of it, and it only can maintain an action for it, unless it has delegated the right to some one else in distinct terms to sue for and collect in his own name; and even in such a case the informer should state in his petition that he prosecutes as well for the state as himself, so that it may appear of record who are entitled to the respective shares. The statute in this case provides that the penalty may be recovered in an action of debt upon the complaint of any person, but there is no express authority given for such person to be the plaintiff in the action or to maintain the suit in his own name; that wherever the statute does *not* do so the informer is merely interested in the proceeds of the suit, but has no right to maintain it. There are numerous instances in the statutes where different persons are authorized to sue in such cases, but the right is given in clear and distinct language as, for instance, "it shall be lawful for any person to sue," "may bring an action in the name of," "to be recovered at the suit of," etc., etc. I remember but one instance authorizing a civil suit where the words "to be recovered on complaint of," etc., are used and these words were used in authorizing an assessor to sue when the money clearly belonged to the state and the assessor not interested in it.

If there were any doubt on this point, on general principles, I think it is settled by a statute of the state.

Section 7 of the act for the appointment of a commissioner of railroads and telegraphs, Swan & Saylor, page 77, provides that "all prosecutions against railroad companies for forfeitures, penalties or fines, shall be by action in *the name of the state of Ohio*, etc., etc., etc.," and this act having been passed two years before the statute in question I see no reason to doubt its applicability in the absence of an express promise of the later act authorizing the informer to sue in his own name.

On the whole case, therefore, I hold that the plaintiff, George Gause, has no right to maintain the action he has attempted to

maintain, in his own name; but that the action must be maintained by the state of Ohio itself on complaint of the informer.

The defendant's demurrer to the plaintiff's petition is, therefore, sustained.

J. A. Sinette, for plaintiff; James Mason, for defendant.

**\*DAMAGES.**

[Cuyahoga Common Pleas, January Term, 1879.]

**ROCK V. STONEMAN.**

The measure of damages for breach of a contract to grade a street between lands of the plaintiff and defendant, the grading to be done by defendant, is the difference between the use of the property of plaintiff for purposes for which he designed it, together with what would naturally and proximately flow from the failure to build such road.

This was an action brought to recover damages for a breach of contract to grade a street lying between lands of the plaintiff and defendant. By the contract the plaintiff was to dedicate twenty feet and the defendant thirty feet for the street, and the defendant was also to do the grading. The plaintiff alleged that the street remained in an impassable condition, and in consequence he was without practicable access to his lands, which, he alleges, would have been greatly enhanced in value if the street had been graded. On behalf of the plaintiff the measure of damages was claimed to be: 1. The difference in value of the plaintiff's lands with or without the street; or

2. The value of the land dedicated by the plaintiff to the street together with expenses incurred by him in accommodating former allotments to the street in question; or

3. The loss which the plaintiff has sustained by non access to his lands.

HAMILTON, J.

Held the measure of damages to be "the difference between the use of the property of the plaintiff for the purposes for which he designed it, as understood between the parties at that time and what would naturally and proximately flow from a failure to build that road"—down to the time of the commencement of the action.

**\*ERROR-**

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[Holmes Common Pleas, January Term, 1879.]

**CATHARINE SHREVE v. LOUIS PARROTT.**

A judgment of an inferior tribunal, as mentioned in section 6708, Revised Statutes, can be corrected for errors, not apparent on the record, by the court of common pleas, and therefore, a judgment of a justice against a married woman on her note, not given for the improvement of her estate, and which is only suable in equity, may be reversed in error though the record does not show the coverture.

**VOORHES, J.**

The plaintiff files her petition in this court asking the reversal of judgment rendered by John Lindsey, a justice of the peace, on the 13th day of May, 1878.

She avers in her petition that the defendant brought his suit before said magistrate against I. N. Shreve and Catharine Shreve to recover the amount due upon two promissory notes, for the sum of \$80 each, dated July 20, 1877; one due January 1, 1878, and the other March 1, 1878. Said notes were each signed by said Israel N. Shreve and Catharine Shreve, and payable to the said Louis Parrott.

After making several continuances of the cause on the 11th day of May, 1878, the case was tried by said magistrate upon testimony, and a judgment rendered in favor of Parrott against said Israel N. Shreve and Catharine Shreve for the sum of \$135.

The plaintiff now asks this court to reverse said judgment as to her, for the reasons set out in her petition, to wit: She at the time of signing the notes and at the time said judgment was rendered was a married woman, being the wife of the said I. N. Shreve. That the notes were given to Parrott to secure the payment of an individual indebtedness of the husband, and that she at the time was in no way indebted to or liable in tort to the said Parrott.

She claims that the justice erred in rendering judgment against her upon these notes, she being a married woman at the time they were given and no consideration therefore moving to \*her, 53 she being merely a surety for her husband.

The law is clearly settled in this state that to make a married woman liable in an action at law upon her contracts, it must be upon such a contract as she is enabled to make under the law. By the act of the legislature passed April 3, 1861, and amended by the act of March 23, 1866, she is empowered during coverture to contract for labor and materials for improving, repairing and cultivating her separate real estate, and to lease the same for a term not exceeding three years. These acts give the wife absolute control over her own property and make her liable in a suit at law upon such contracts as she is enabled therein to make.

But for a married woman to make her property liable for the payment of her agreements in equity, "something more than merely incurring the obligation, which the law would create if she were a single woman is necessary to effect the estate of a married woman, in order to bind her separate estate by a general agreement it should appear that it was made by her with reference to and upon the faith and credit of her estate, under such circumstances as makes it equitable that such charge should be enforced. 30 O. S. R., 147."

If the facts set forth in the plaintiff's petition are true, this judgment very clearly is based upon such a contract as she had no statutory power to make, so as to afford to Parrott a right to enforce it at law, and if it is still such a contract as he might be enforced in equity, then has he failed to invoke the aid of a court possessed of chancery powers, but is found in a court powerless to afford him a remedy upon the contract which he procured from the plaintiff.

The justice having rendered a judgment against the plaintiff and it not appearing of record that she was at the time of making the contract and of rendering the judgment a married woman, the question arises whether or not this court has power to relieve her of the error of fact of which she complains. A solution of this question requires that we look to our code of practice and see if on complaint in error against the proceedings in an inferior court we can look beyond the record and relieve a party from an error not apparent therein.

In division 4, chapter 6, of the act to revise and consolidate the laws relating to civil procedure, passed May 14, 1878, found on page 673, of the acts of 1878, it is provided in section 1, that a court of common pleas or a superior or district court may vacate or modify its own judgment or order, after the term at which the same was made for the reasons therein stated. One of, and the 5th reason therein given is, "For erroneous proceeding against an infant, married woman, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings. Such error is brought to the judicial notice of the court, under the provision of section 5, of the same chapter by filing a petition, verified by affidavit setting forth the judgment, or order the grounds for vacating or modifying the same, and if the party making the complaint was defendant he must set forth in his petition his defense to the action. From this provision of the law it is manifest that a party may be relieved from an error not only in *law*, but also of *fact*, when application is made to the same court in which the error occurred.

The case before the court, the error complained of being one *coram vobis*, instead of *coram nobis*, presents the further question: how this court's power to relieve a party from an error of *fact*, committed in an inferior court, can be invoked.

By reference to the act of the legislature regulating the juris-

diction and procedure in error, page 803 of the acts of 1878, it is provided in section 2, that a judgment rendered or final order made by a probate court, justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated or modified by the court of common pleas. This section confers on this court ample powers to vacate, reverse or modify any judgment rendered by a justice of the peace of the county. But again, can it be done without the error complained of appearing in the record? Section 3 of the same act, provides that a judgment rendered or final order made by the court of common pleas, or any superior court may be reversed, vacated or modified by the district court for errors appearing on the record. A like provision is made in section 4, for the supreme court to reverse, vacate or modify any judgment or final order made by any court board or tribunal mentioned in said sections 2 and 3.

From the statute it would appear that the district court and the supreme court can reverse, vacate or modify judgments and final orders, when the error complained of is manifested in the record. But the court of common pleas is not interdicted from considering an error not apparent by the record. It has power as ample to review the record of a justice of the peace when properly brought before it as it would to review its own judgments and orders, to purge them from such errors as should not be permitted to stand, one of which is, an erroneous judgment rendered against a married woman, which could be heard in the court rendering the judgment only by being brought to judicial notice by a petition. If the court may reverse, vacate or modify its own judgments at a term subsequent to rendering it, for the error that it was erroneously rendered against a married woman, we think the power of this court is ample to review the judgment of a justice and reverse it for the same cause.

It being admitted by the parties that the plaintiff at the time she gave the notes and at the time the judgment was rendered, was a married woman, and it not being denied that the notes were given for the individual indebtedness of the husband, we think the judgment as to the plaintiff must be reversed.

Hon. Wm. Reed, for plaintiff; Stillwell & Hoagland, for defendant.

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### \*BREACH OF PROMISE—PLEADING.

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[Cuyahoga Common Pleas, May Term, 1878.]

#### REBECCA DALTON V. WILLIAM BARCHAND.

A petition alleging a breach of a promise of marriage, and a promise as a condition precedent of the marriage in which defendant promised plaintiff that he would give her a sum of money and a secured note and marry her within a reasonable time, constitutes a single cause of action, namely, breach of the marriage contract, and a motion to separately state and number the causes of action must be overruled.

HAMILTON, J.

This is an action brought for a breach of promise of marriage. The plaintiff alleges that at the date of the contract she was a single woman and the defendant a single man; that the defendant to induce her to enter into the contract represented that he had a large farm, well stocked, and that he was willing and able to provide her with certain means of support, and that as a condition precedent and as part of his contract he would give her, prior to the marriage, \$500 in cash, and \$500 in a note secured by a mortgage, and would then marry her within a reasonable time. She avers that he has not done any of these things, and lays her damages at \$10,000. A motion is made to separately state and number the causes of action. We think there is but one cause of action—a breach of the marriage contract—contained in the petition, and the motion is overruled.

W. S. Kerruish, for plaintiff; Neff & Neff, for defendant.

### MECHANIC'S LIEN—PLEADING.

[Cuyahoga Common Pleas, M y Term, 1878.]

#### A. TEACHOUT V. THE CITY OF CLEVELAND.

A petition by a sub-contractor against the owner, under the mechanic's lien law, should aver that the materials were furnished for the particular building which he seeks to reach, and the owner may deny and disprove this, and although he may have given the contractor a copy of the attested account, still he may defend on the ground that the materials were furnished for other work.

HAMILTON, J.

The plaintiffs aver the making of a contract between one A. J. Piper and the city of Cleveland for the building of certain hospital buildings in this city; that they furnished the contractor, A. J. Piper, with certain material for the purpose of building these hospital buildings; that he failed to pay them, and they filed an attested account with the city as the owner of the hospital building; that the city in due time gave the contractor a copy of the attested account; that the contractor failed to notify them or the city that he contested the account, and that it has not been paid, either

58 \*by the contractor or by the city. The plaintiffs therefore say that the city is liable, and it having refused to pay them the amount of this contested account they bring this action.

The defendant, by way of answer, in its first defense, says that it admits the making of the contract with A. J. Piper, the contractor, and that it denies everything else. For a second defense it says that the amount due the plaintiffs has been fully paid by the contractor; and for a third defense says that the material furnished by Teachout & Co. the plaintiffs, was furnished for other build-

ings than the hospital building and did not go into the construction of these buildings at all and says further there are several parties who have filed mechanics' liens—that is, attested accounts—with the city, and sets out what they are; and further states that all of the amount that was due Piper had been paid before the filing of this attested account of the plaintiff's with the exception of one hundred and forty-nine dollars and some cents; and therefore asks that if any judgment is to be rendered against the city that an account be taken of all these different accounts that have thus been filed by all of the parties, and that the amount be prorated among them. A motion is made that the averment contained in the answer that these materials were furnished for other buildings than the hospital buildings be stricken out. It is claimed in behalf of the plaintiffs that the city having failed to pay under the state of facts related in the petition, to wit: an attested account having been filed by the plaintiffs and no denial of it having been made by the contractor, that he is to be considered, by the express language of the statute, to have consented thereto, and that the amount of it cannot be questioned; that it is not therefore in the power of the city at this time to make a defense for the contractor; that it is of no sort of consequence to the city to whom it pays these funds, and cannot deny that the material was furnished for the purpose averred.

It is further asked that the answer be made more definite and certain by setting out what proceedings have been had in regard to them.

As to the point whether the city can make the defense that the materials were not furnished for this building, I am inclined to the opinion that it became necessary for these plaintiffs to aver that these materials were thus furnished—that it was a material averment in the petition, of which the plaintiffs would have to make proof upon the trial of the case; and that any party they seek to make liable upon that state of facts, has a right to come in and deny that it is true. But however that may be, I think under the state of the pleadings here, that we cannot proceed to determine the controversy between the parties in this case without the presence of these other parties that are said to have filed attested accounts. This is a fund in the hands of the city, and all these parties are given a lien upon it by the express language of the statute, but they are entitled to be paid *pro rata* out of that fund. The order therefore will be that the defendant bring in these other parties who have filed attested accounts, and for the present this motion will be passed until the coming in of those parties.

Caldwell & Sherwood, for plaintiff; Heisley & Weh, for defendant.

## PUBLIC WORKS.

[Cuyahoga Common Pleas, May Term, 1878.]

## THE LESSEES OF THE PUBLIC WORKS V. THE CITY OF CLEVELAND.

1. An action for injury to the canals must be in the name of the state, but where the lessees of the same aver that the city has allowed its drains to run into the canals, and thereby entailing a great expense on such lessees in keeping the canal in proper condition for navigation; *Held*, that such petition does not merely state a cause of action for injury to the canal, but also a cause of action for injury to the business of such lessees, and that for this they could sue in their own names, and therefore a general demurrer to such petition will be overruled.

HAMILTON, J.

Plaintiffs say in their petition that they had leased the Ohio canal, from Cleveland to the Ohio river; that they are in the use and occupation of it and so have been since the year 1861; that they rented it for a period of ten years; that the time of their lease has been extended for another ten years, and that they have, for all this time, been in the use and occupation of this property. They say that the city of Cleveland is a municipal corporation under the laws of this state, and that it, in the year 1870, caused certain drains to be made in a portion of the territory of said city, and describing it in the petition between certain points; and that by reason of those drains dirt and filth have accumulated in the canal—washed in by means of the defective construction of the drains themselves and the imperfect manner in which they have been maintained by the city; and that a vast accumulation of material of that kind has occurred from time to time during these years, and they had been compelled to excavate the canal at great expense to themselves; that it has retarded the navigation of the canal; that it has interfered with their business as such lessees, all of which to their damage in the sum of three thousand dollars.

To this petition a demurrer is interposed by the city, and one or two points are taken which, perhaps, are unnecessary to notice until we come to the proposition in which it is asserted that there is a statute in this state by which it is required that in the case of damage to canals or public improvements, whether the canals are owned by the state or owned by incorporated companies, an action for an injury to the canal shall be commenced and maintained in the name of the state of Ohio, and provides that the proceeds of whatever judgment may be rendered shall be paid to the collector nearest the spot where the injury occurs; for it is said the statute having made it mandatory to sue in that name, the remedy being given in the name of the state, these lessees have no right whatever to commence this action in their own name.

It might possibly be argued with considerable force that although the statute prescribes that any party who thus ob-



structs the canal shall be liable to be sued in the name of the state of Ohio, the statute having been passed prior to the code, the code itself changes the rule. It may be argued perhaps with some force, that by the act by which these lessees came into possession of this property they have the same rights that the state of Ohio has by the enactment itself; yet the statute seems specific upon that point, and I am referred to a case that was passed upon substantially between the same parties and perhaps under a like state of facts at the September term of this court, 1877, in which a demurrer to the petition was upheld. I therefore treat it as having been passed upon and adjudicated that the action should be commenced in the name of the state for an injury to the canal. But on referring to that petition it seems to me it is not as broad as the present petition. In this petition there is not only an allegation of an injury to the canal but the allegation of an injury to the business of the lessees.

By looking at the statute it will be seen that for an injury to the canal, the remedy is by an action in the name of the state of Ohio. But suppose as incident to that injury, or as outside of it, express damage has resulted to somebody else as a consequence of the injury itself; that an obstruction is placed in the canal and a man navigating the canal is injured by the obstruction—now the fact that in an injury to the canal itself the remedy should be by an action in the name of the state, does not render it necessary that all cases of resultant injury, growing out of such obstruction should be commenced in the name of the state; and in this case there is a \*general averment that the lessees were injured in their business, that their business was retarded and broken up in a measure. That is not an injury to the canal itself, but an independent transaction, and for that they have a right to maintain an action.

The demurrer being general, going to the whole cause of action, we think should be overruled.

Grannis & Burton for plaintiff; Heisley & Weh for defendant.

### \*CHattel Mortgages.

65

[Cuyahoga Common Pleas, January Term, 1879.]

†ANNIE REHAK v. JOHN M. WILCOX, SHERIFF.

1. The re-filing of an original chattel mortgage, with all proper indorsements, is a substantial compliance with the statute.
2. Although the mortgagee of chattels neglects and fails to re-file his mortgage (or copy) within a year from and after the first filing, yet if he does so re-file it after the year, he will, in the absence of fraud, be protected and his mortgage will be valid, as against an execution creditor, whose execution is not levied until *after* the second filing.

†A contrary decision is found in *Cooper v. Koppes*, 45 O. S., 625, 2d Ed. 4 B., 79.

JONES., J.

This case comes into this court on error from a justice of the peace, to reverse a judgment rendered by said justice in favor of the defendant, in error, also defendant below.

The plaintiff in error held a valid and regular chattel mortgage from a society called the "Slavonska Lipa" upon its personal property, which said chattel mortgage was duly filed with the county recorder in manner and form required by law, on the 20th of October, 1877, at 4 p. m.

Said mortgage was not, nor was a copy thereof, re-filed "*within thirty days next preceding the expiration of the term of one year*" as the statute directs it shall be; but said mortgage was duly verified and re-filed on the 21st day of October, 1878, at 10.06 A. M., about one day after the expiration of the year.

One John Kopstein had recovered a judgment against said society at the March term, A. D. 1878, of the court of common pleas, and after the re-filing of said mortgage said Kopstein ordered out an execution directed to the sheriff of Cuyahoga county, who, on the 24th of October, 1878, made a levy on the property mentioned and described in plaintiff's mortgage. The plaintiff thereupon replevined the property under her mortgage from the sheriff, and in the trial below the justice found that the mortgage to the plaintiff had no validity, as against the levy of the defendant who was the sheriff who levied the execution.

It is conceded that the mortgage was given to secure a just demand, and that this demand had not been satisfied when the levy was made.

The important question is whether the mortgage had ceased to be a valid lien as against the defendant, involving, as it does, the further question as to whether the re-filing of the mortgage after the expiration of the year from the first filing, is effectual to protect the mortgagee as against an execution creditor, where the execution is not levied until after the second filing.

This question, so far as I can ascertain, has never been decided in this state.

Our statute on this subject reads as follows: "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of *one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage*, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid claimed by virtue of such mortgage, shall be again filed in the office, &c.—Vol. I. S. & C. p. 475 and 476.

In the 7 O. St. Rpts., p. 198 it was held that the *re-filing of the original mortgage* with the proper and requisite indorsements, is a substantial compliance with the provision contained in the above statute—and I think that there is nothing in the statute that invali-

dates a chattel mortgage filed after the expiration of one year from the first filing as against liens acquired *subsequent* to the second filing.

If a mortgagee wishes to maintain a *continuous* lien by his mortgage he can only do so by complying with the statute, and re-file within thirty days next preceding the expiration of the year; but if he does not do so, but allows the thirty days or a year to elapse, and re-files the original mortgage properly verified (or a copy) after that time and if it is so re-filed and *before* other intervening liens occur or attach, his mortgage while so re-filed, in the absence of fraud, must prevail against subsequent liens on the property described in the mortgage.

There is nothing in the statute that will make such a mortgage invalid as between the mortgagor and mortgagee if the original or a copy is not filed within the thirty days, &c. as between the mortgagor and mortgagee it will always be valid; if not refiled (it is all the same a valid mortgage), becomes inoperative, dormant and invalid as against creditors and purchasers—and upon being re-filed will become valid and revived as against such creditors and purchasers whose \*liens had not attached during the interval.

Entertaining these views, the judgment below must therefore be reversed. 66

Stone & Hessenmueller, attorneys for plaintiff in error.

Wilson & Sykora, attorneys for defendant in error.

### TAX SALES.

[Cuyahoga Common Pleas, January Term, 1879.]

SAGE v. THOMPSON.

JONES, J.

In this case it was held that a purchaser at a tax sale had no lien upon the property purchased for the amount of the purchase, the penalty and interest.

### \*TRESPASS.

73

[Cuyahoga Common Pleas, January Term, 1879.]

† FREDERICK WILSON v. ERWIN HIGGINS.

Where the trespass consists in the mere repetition of the same conduct, as digging a ditch and flooding the land, the mere fact that the trespass is laid as on different days between given dates gives no right to separating and numbering the trespasses.

JONES, J.

The plaintiff's amended petition sets forth that on or about the first of January, 1876, he was and has ever since remained the owner

†Another decision in this case is found 2 Cleve., 411.

of and had been in the possession of certain land in Mayfield, Ohio, —giving a full description of the lands. That the defendant being in the possession and occupancy of the adjoining premises, he says that on or about the first of January, 1875, and on diverse times and days between said date and the first of April, 1878, entered said premises, and dug and opened an artificial ditch across the highway to and upon said premises of the plaintiff, causing water, etc., to pass over on the ground of the plaintiff, washing and tearing the roots of his hedge and injuring his premises, causing them to be muddy, and prevented the plaintiff from using them during the said term; and further says by an amended petition filed August 29th, 1878, that the continued acts aforesaid from time to time, and acts so done in continuation, constituted a continuing and permanent injury to the premises.

The defendant moves the court to require the plaintiff to separately state and number his causes of action, his theory of the case being that each time the defendant entered the premises constituted a separate and distinct cause of action.

This motion was once or twice granted in this case.

Gould says in his admirable work on pleadings, section 86, "In trespass when the plaintiff sues for different wrongs of the same nature committed by continuation or repetition, on several different days, he may recover all of them, on one count, by including in it as many days, or as long a period of time as his case may require." Especially is this so where the continued trespasses are of a permanent nature; as in a case like this—digging a ditch, and the water continually running through the plaintiff's premises in consequence.

The rule for separately stating and numbering is to be applied where the several trespasses is a mere repetition of the injury, and where the results of each injury are clearly distinguishable from each other—where what is done by one trespass is clearly separate and distinct, and the injury separate and distinct from the injury done by another trespass. If these trespasses in this case are a

74 continuing and permanent injury, in my judgment the \*defendant in this case is not entitled to have the plaintiff separately state and number his causes of action. He has but one cause of action and that one is well pleaded. The motion is overruled.

Prentiss, Baldwin & Ford, for plaintiff.

Tyler & Denison, for defendant.

**\*GUARDIAN AND WARD—TRESPASS.**

81

[Cuyahoga Common Pleas, March Term, 1879.]

**ALIDA JOHNSON, ET AL., ETC., V. NICHOLAS MEYER.**

1. A guardian has no right to dispoil the real estate, and if he sells a barn on it and the buyer takes it down and away, the buyer is liable, and the guardian is also held to be a co-trespasser.
2. The possession of a guardian of the real estate of his ward is the possession of the ward, so as to sustain an action of trespass by the ward, by his next friend, for a trespass committed under an unlawful permission by the guardian.
3. Where a will leaves real estate to the widow and heirs in certain proportions, the heirs may maintain an action of trespass without joining the widow; but can only recover for their proportion of the injury.

JONES, J.

Gentlemen of the Jury: This is an action brought by sundry minors, heirs of Martin Johnson, deceased, by their next friend, against Nicholas Meyer, defendant, and the averment of the plaintiff's petition is this: That about 1872, the defendant Meyer unlawfully and forcibly entered the premises of plaintiff on Columbus street, broke into his close between Columbus and Johnson streets on the one side, and Clark avenue and Walton avenue on the other, and that he then and there tore down, carried away, took to pieces a barn then and there a part of the realty, part of the landed property of the heirs of the value of \$800, and that he converted this property to his own use. That is entire the allegation of the plaintiffs' petition.

The defendant comes in and answers, and denies substantially all the allegations of the plaintiffs' petition,—denies each and every specification except such specification as he expressly admits. He does not expressly admit any material allegation, so that substantially the burden is upon the plaintiffs to prove all such facts as are essential to make out their case.

To entitle the plaintiffs to recover in this case, they must show that at the time this injury was committed, they, the plaintiffs, were possessed of this property. That they substantially had the ownership is not denied here. It is conceded upon the trial that they were the owners in such manner and form as is provided by Martin Johnson's will. That is the substantial concession on the other side of this case. Martin Johnson died, seized, it is admitted, of this property; and the plaintiffs, by that admission, admit that these children of this mother were possessed of this property with such title as this will gave to them severally and collectively.

Now then, as I have said, the plaintiffs must make out substantially that they had the ownership and possession of this property at the time that this injury was committed. They must show that the defendant unlawfully entered this close and took away and

converted to his own use this property. Now I charge you that if he the defendant, entered this close by permission of the guardian for any lawful or ordinary purpose, that did not give the defendant the right to enter the premises and dispoil and carry away any portion of the property. A guardian, as such, has no right himself to remove or dispoil any portion of the real property, to carry it away or reduce it or remove it in any way whatever, without the consent of his wards or without the assent of the probate court. And any one who may know of his guardianship, and that the property is the property of the wards, cannot protect himself against an action for removing or dispoiling any portion of the realty by mere proof that the guardian authorized it or that he had paid the guardian for it. I think the true situation in this case is simply then that the guardian is the trespasser in such case, and that the person to whom he sells and who is authorized by him to carry it away is also a trespasser and that they may be liable jointly or severally; that if one of them makes satisfaction of the claims, that satisfies both; that both or either of them may be sued until there is a satisfaction made for the injury; that an action against one is no bar to an action against the other; and the probate court, on its own motion, requiring Mr. Hornsey to put this item into his account for wrongfully selling this property, is no bar to this proceeding. If it had been true that at the instance of the heirs he had been made to account for the very identical money that he had sold this property for, that might amount to a ratification of the act of sale,—an election to take the proceeds instead of to go for the article. But there is nothing in the proceed-

82 ing of the probate court \*that is a bar to this proceeding, or that should affect it in any way whatever. There was something said in the argument about this property having been changed from realty into personalty, but I do not know whether any request will be made on that subject or not. The guardian could not change it from realty to personalty by moving it from one portion of the lot to another. It would be realty after removal as much as it was before. There are many instances where buildings placed upon property are not considered a part of the realty; but I do not know that any such question as that can fairly occur in this case from the proof in the case. If counsel on either side claim that there is a fair question to be made of that I will cheerfully respond to any request that may be made upon the subject.

If you find that this was the close of these plaintiffs, either in whole or in part; if they had possession of it exclusively or in connection with their mother under the terms of this will, and although they went away temporarily and left it in the possession of the guardian, I hold that their possession is still sufficient to enable them to maintain an action for trespass for any such injury that is complained of in this case. If you find they had possession; that it was on their close that the injury was perpetrated, then the question arises, how much are to be the damages? I think the true rule of damages in this case is this: You are to give these plaintiffs a

sum of money that will compensate them for the injury that they have sustained. I do not mean by that to include the injury that their mother also sustained at all, but leave them to recover simply an amount of money that will be equivalent to satisfy any injury that they have received. And, of course, in estimating that, you will have to take into account the ownership of this property, as provided by this will, in the mother—ownership and possession to a certain extent.

Carefully examine the case. I see no reason in this case, and it is not claimed by counsel, that there should be any cumulative damages; it is a case for compensation, to make these plaintiffs good for the injury they have suffered, that they have sustained by being deprived of this barn and its use.

Now gentlemen, I believe I have substantially covered the law points in this case; I will, however, specifically respond to the full requests that are made by counsel on either side.

The plaintiffs request me to say "That the occupation and possession of the guardian is the occupation and possession of his wards." I think that is correct.

2. "That the powers of a guardian appointed by the probate court, are limited by law, and while he has a right to care for the property of his ward, he has no right to waste it;" I leave that out because I do not think it is of any importance in the case. He has no right to sell the real estate of his ward, or any of it, without the order or decree of the probate court having jurisdiction in the matter. I charge you that is law.

3. "That every one dealing with a guardian in his trust capacity, is presumed to have knowledge of his powers, conferred by law, and is chargeable with knowledge of such powers." I think that is law.

4. "That if a guardian, by a breach of his trust convey any portion of the estate in his hands to a purchaser who had notice of his being a guardian, the wards may maintain an action against the purchaser for the value of such property although he has paid the guardian for the same." That is the law.

5. "That if the jury shall find that the defendant entered upon the property of plaintiffs at the request of the guardian, John Hornsey, and having paid him for this barn, tore it down and removed it from their premises; if they shall also find that he was acting in this matter without authority of law,—then the defendant is liable to respond to plaintiffs for the full value of the barn." That is inconsistent with what I have already said, and I refuse to charge that as the law for the reason that it asks me to charge that these plaintiffs shall recover the full value of the barn. I say you may give these plaintiffs full compensation for any injury that they have suffered in consequence of the loss of this barn. Both parties derive their title from this will; and, by this will it appears that the wife has a one-third interest in this property during her lifetime, and for a certain time she has a possessory interest in this property with

her children. You may take this fact into account in estimating how much these children have lost by having been deprived of this barn. I refuse therefore the 5th request.

6. "A barn standing upon the property of these plaintiffs, which was left them by their father, is a portion of their real estate,"—that is hardly so,—“a part of the realty, and their guardian would have no right to sever it nor dispose of it without the order of the probate court.” That is what I have already said, substantially.

7. I am asked to charge the jury “That the measure of damage in this case is the value of the barn as it stood upon the realty, before it was severed from the realty.” I have already given you a different rule from that in estimating the value of the barn. I will give it now qualified to an extent. In estimating the value of the barn, you will estimate it as to what it is worth upon the realty, and in estimating what damages these plaintiffs have suffered you will take into consideration, as I have already said, what their real rights are in the property and what other people's rights are in the property.

Now I have been also requested to charge numerous charges on the part of the defense. I am asked to charge,

1. “That to maintain this action, the plaintiffs must satisfy you that they were in the actual possession of the premises at the time of the committing of the wrongs complained of or the right to the possession of the same.” I say yes, but that possession may be by their agents or guardian, as well as by personal possession.

2. I am asked to charge, “If you find that John Hornsey was, at the time of the doing of the wrongs complained of, the duly appointed guardian of the property of the plaintiffs, then that the said John Hornsey was entitled to the possession and control of the said estate owned by the plaintiffs.” Now I decline to say that to you. I say that a guardian is entitled to the possession and control of his ward's real estate, but in view of the provisions of this will which is in evidence here, I decline to say that John Hornsey was entitled to the possession of this property, and I think there seems to be no dispute, substantially, between counsel on either side, that Mr. John Hornsey was actually exercising guardianship over this property at that time, so that the point is of no very great consequence one way or the other.

3. I am asked to charge, “That John Hornsey, as the guardian of the plaintiffs, was by law authorized and entitled to collect and receive from the defendant, compensation for the injury claimed to have been committed by the defendant in removing said building—and that if he did so, no recovery could be had in this case.” I refuse that charge. There is no such question in this case. Nobody had denied that this damage was done and that afterwards Hornsey settled for it. \*There is no such question as that in the case, as I understand it, and I refuse the charge.

4. I am asked to charge that, “If the jury find that the defend-



ant paid to John Hornsey as the guardian of the plaintiffs at the time he took the barn away, in full for the same, and entered said premises and removed said barn with the consent and permission of said guardian, then the plaintiffs cannot recover." I refuse that because I think the guardian had no right, either himself or in connection with Mr. Nicholas Meyer, to remove that barn without authority.

5. I am asked to charge, "If the injury complained of was caused by the misconduct of the said Hornsey as the guardian of the said plaintiffs, then the said Hornsey is liable on his bond as such guardian, and his sureties on said bond are likewise liable with him on said bond." I refuse it as of no consequence in the case. Whether he is liable or not liable, the fact that he is liable does not release him from any liability that he may have incurred to this estate.

6. I am asked to charge, "From the amount you find the defendant liable for, if you find him liable in this action at all, you should deduct the amount you find he paid to the said guardian, from the sum you find him liable for." I refuse this; there is nothing in the proof whatever, going to show that this estate has ever got this money. The mere fact that Mr. Hornsey authorized the trespass made him a trespasser himself. They were both trespassers; and the fact that one of these trespassers paid the other money does not relieve the one that pays, nor the other, from liability to respond to the state therefor.

7. I am asked to charge, "If you find that the said Hornsey in his account as guardian of the plaintiffs, in settling with the probate court of this county as such guardian, has been charged with the amount paid to him by the defendant for said barn, and find that the defendant did pay the same to said guardian, then the said sum so paid to him by the defendant and accounted for by said guardian in said settlement and accounting with said probate court, should be deducted from any sum you may find the defendant liable for in this case." I refuse it. I do not think that the record shows that he was definitely charged in that record with an amount paid by anybody for the barn, but that it shows that he was charged as a wrongdoer with having converted the barn to his own use, and that it was worth that much. No proof is offered that the said amount has ever been paid over to the heirs and I hold that this is no satisfaction to them whatever or any bar to this action.

Marvin, Laird & Taylor, for plaintiffs.

B. R. Beavis and Henry McKinney, for defendants.

**\* ASSIGNMENT OF MORTGAGES.**

[Cuyahoga District Court, March Term, 1879.]

**PETER AND CATHARINE WIRTZ V. GEORGE LEICH.**

Where a mortgagee transfers, by indorsement, the note and mortgage, without having notified the mortgagor of such assignment, the assignee of such mortgage holds it subject to all payments thereafter made in good faith by the mortgagor to the mortgagee.

**LEMMON, J.**

The petition of the plaintiff below alleges that in the month of March, 1872, one Frederick Buehne made his note to the Allemania insurance company, for the payment of four hundred dollars, and then proceeds to set out that in the year previous, 1871, one Peter Beckner and others made, executed and delivered to one Gustav Schmidt a mortgage upon the premises described in the petition for the securing of a note of \$850, then made and delivered by Peter Wirtz and Catharine Wirtz to Schmidt. It proceeds then to allege that this note and mortgage by these parties was subsequently assigned and transferred by Schmidt to Frederick Buehne. This transfer is charged to have been made in August, '72. Then it proceeds to allege that in September, '73, Frederick Buehne assigned this note and mortgage to the Allemania insurance company as collateral security to the \$400 note which he had given to the Allemania insurance company in 1872, that there is a larger amount due on the last note, and asks for a judgment against Frederick Buehne for the amount claimed to be due on the note given by him, \$400, and interest payable annually, and that the premises described in this mortgage be subjected to sale and the proceeds be brought into court and applied in discharge of that judgment against Frederick Buehne, etc., and for other relief.

An answer is filed to this petition which alleges that the defendants, Peter and Catharine Wirtz, made payments larger in amount than the credits; that these payments were made in good faith by them to Frederick Buehne after he had disposed of the notes and mortgage to the Allemania insurance company, without notice of any interest in the Allemania insurance company in this mortgage.

The court of common pleas upon the trial of the case below must have held, as their judgment shows, that the transfer of the mortgage and note that was thus given by these parties, taken by the Allemania insurance company as collateral security, vested absolutely all interest in the note and mortgage in the Allemania insurance company, and all the rights and remedies between the parties would exist as though all the parties at that time had notice; in other words, that any payment made on this mortgage and note

neld by the Allemania insurance company as collateral was a payment which the party could not take advantage of in his defense, that he should have seen that the payments when made were indorsed upon the paper by the party to whom the payments were made, and that making payments without securing such indorsements, was carelessness for which the parties were not entitled in equity to have stand as against the Allemania insurance company. This involves the question as to what are the respective rights of parties upon the transfer of a mortgage from one person to another. Cases have been cited, decisions of the supreme court of Michigan and Wisconsin, and also a decision of a very eminent judge of the supreme court of the United States—Justice Swayne, in each case holding that where a mortgage had been given to secure a debt evidenced by a negotiable promissory note that the mortgage, being an incident to the debt, partakes of the negotiable character of the note and is so far affected by it that the commercial rule applicable to negotiable paper is applicable also to the mortgage, and these cases have been cited and pressed upon our attention. These cases, except the last one, have been examined by our own supreme court; and in a very able discussion of this subject by our supreme court, in an opinion announced by Judge Ranney, the matter is examined \*apparently from the earliest decisions of the courts of Eng- 90  
land and through the various holdings of our supreme courts  
in various states, down to the time of the making of this decision contained in the 14th Ohio St. Reports made in December, 1863. Since this decision, the decision of Justice Swayne has been made.

In commenting upon the decisions in Michigan and Wisconsin upon this subject, Judge Ranney uses the following language: "But the direct question arising upon mortgages given to secure negotiable paper, has arisen in two of the new states of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held, that the quality of negotiability is so far imparted to such mortgages, as to make them available in the hands of a *bona fide* indorser of the paper, without any regard to the equitable rights of the original parties."—Here citing the cases that are pressed upon our attention.—"In the first of these cases, decided by the Chancellor of Michigan, in 1843, no reasons are assigned, or authorities cited; and in *Dutton v. Ives*, decided by the supreme court in 1858, the doctrine is again advanced upon the authority of *Reeves v. Sently*, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that state (*Fisher v. Otis*), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The court say: 'This doctrine is sustained by respectable authorities, and by reason and sound policy which have long ruled in relation to commercial paper;' and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did *suggest* the question, whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note:

'When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to *suggest* whether, in such a case, the rule of the mortgagee's liability would apply.' The rule here referred to, is that announced by Lord Loughborough in the leading case of *Matthews v. Wallwin*, 4 Ves., 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may fairly be assumed, that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had then no authority to base it upon, that neither the judicial records of England nor of any of the old states, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new state upon another continent. Under such circumstances, it cannot be reasonably claimed, that we are at liberty to regard it as an *established* principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so, are well stated in the case of *Croft v. Bunster*, 9 Wis. Rep., 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt."

Now, after referring to these authorities, the court says: "In a general sense, it may be very well and very correct, to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is *incident* to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt, is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations."

The conclusion to which the supreme court come, after a very full discussion of all these cases, is as follows: "A long experience has demonstrated, that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges, when we say, that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should

not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action, and whether standing alone, or taken to secure negotiable or non-negotiable paper, they are only available for what was honestly due from the mortgagor to the mortgagee.” Now recognizing that to be the doctrine established by our supreme court in this regard, we are brought to another question, whether this rule, thus recognized, must not be so far limited as to cause it to apply only to the equities which exist at the time of the assignment and transfer, or whether, in the broad language of our supreme court, the mortgage is to be treated as a chose in action—whether there is any limitation to this designation of it, or whether, like other choses in action, it has all the properties which pertain to a chose in action at common law. It is well understood by the bar, that where a mere account is transferred by one to another, the debtor is protected, if in good faith he subsequently without knowledge on his part and without notice, pays it to the party to whom he originally owed it; that as to the debtor, he is not estopped from showing that payments were made and from availing himself of them until the assignee of the chose in action has given him notice. It is the duty of the assignee to give notice to the debtor.

Now does that principle apply here? Is a mortgage a chose in action for some purposes and not for others? We are unable to find any authorities—we know of none—that distinguish a mortgage from a mere matter of account—a claim upon an account. If the same rule governs, then we say that the payments made in good faith without notice, without knowledge, to the person who has been the holder of the paper—of the mortgage, is a payment, and in a court of equity, should be regarded as a payment and as a defense to the extent of the payments thus made. Applying this principle to this case, we think the court of common pleas erred in so far as they refused to allow these payments made to Frederick Buehne after the transfer of the mortgage to the Allemania insurance company.

There will be, as stated by counsel, an amount still due upon this mortgage after deducting these payments so made; and for this amount the Allemania insurance company may have a decree for the sale of the property.

No judgment is asked against these \*parties. The judgment of the common pleas court will therefore be reversed and 91 either such judgment entered here as should have been entered in the court of common pleas or the case be remanded for further proceedings in the court of common pleas.

McKinney & Caskey, for plaintiff.

B. R. Beavis, for defendant.

**\*ATTACHMENT—PLEADINGS.**

[Cuyahoga District Court, March Term, 1879.]

**X. C. SCOTT v. HUDSON.**

1. Where the defense in an attachment proceeding is, that the amount due had been garnisheed in another action there being no denial as to the merits of the claim, is an abatement only, and to be complete should aver a readiness to pay what was demanded or to submit it to the disposition of the court.
2. Where a defendant moves for judgment on the pleadings, consisting of the petition and answer, before a reply has been filed: *Held*, that it is within the discretion of the court to allow a reply to be filed, and overrule the motion.

WATSON, J.

This action was originally brought before a justice of the peace and went from his decision to the common pleas on appeal. In the common pleas the defendant put in two pleas, the first of which was matter in abatement. "Now comes said defendant, and as a defense to plaintiff's petition filed herein and says, that previous to the service of summons upon him in this action, the moneys in his hands, alleged in plaintiff's petition to be due from the said defendant to the plaintiff, were attached by process of garnishment issued out of this court in an action herein pending in which one Emma Bobbitt is plaintiff, X. C. Scott and said plaintiff is defendant, and that said attachment remains in full force and undischarged." Then the second is (the action being brought upon an account for services as a physician), that the services rendered were not of the value claimed—the plaintiff's claim being over \$108, and with interest \$114 and a fraction. He says they were only of the value of \$50, not of the value claimed by the plaintiff, and he prays to be discharged.

It is a little difficult to tell what that second plea really is. It is not in bar. The first plea is matter of abatement, and he prays that he may be discharged with his costs. After putting in this he amends it, this plea being filed January 29, 1876, November 21, 1877, by putting in a general denial as against the plaintiff. "Now comes the defendant and for his amendment to his second defense says, he denies each and every allegation contained in said plaintiff's petition."

There he defends to the cause of action. The defendant, while the pleadings stood in this form, moved for judgment and, as claimed in argument here, that after the service of the notice in the garnishee process the money was tied up in his hands and the plaintiff was not authorized to bring his suit. We are not inclined to carry this doctrine to that extent. Now, it will be observed by this plea, when the matter in abatement is pleaded, this defendant does not offer to pay that money into court. In the original answer he ad-

mits himself in debt \$50, and alleges Miss Bobbett had brought suit against the plaintiff, and that the process in garnishment had been served upon him.

Now that was simply a matter in abatement and he might set it up. It did not go to the cause of action at all, and we think that he should have made his defense then complete. He should have come in and showed himself ready to pay what was in demand and put it where the court could dispose of it, to those to whom it properly was going. But he did not do this. He then went on and put in a further answer which is in mitigation, for the purpose of reducing the amount, and finally he denies.

Now here is then, from the very start, an issue as to the very merits of the plaintiff's case. After answer was in and amended, he moved for judgment, and all that we know about the action of the court is that that was not granted; but the plaintiff asked leave to reply, and got leave to reply, and did reply, in which he set up that the attachment process was dismissed and the process of garnishment against the defendant had expired with the attachment in favor of Miss Bobbett. We think in that condition of things that it was not all error for the court to permit that to be replied. He asked for judgment on his pleadings before the reply. It was clearly within the discretion of the court to permit a reply, and the court did and we find no error in that. Then after that reply was in an issue was regularly formed between these parties and they went on and called a jury to try the original case upon the account, and judgment was rendered then for eighty odd dollars against the defendant. In that condition of things, after the verdict, he comes and asks for a judgment, notwithstanding the verdict.

\*Now we do not regard this as a case where a party can 98 come in and ask for a judgment notwithstanding the verdict. The plaintiff had tendered issue by his original pleading. That issue had been regularly joined, and these parties treat the issue presented to the court and the jury, and the jury determined the case in favor of the plaintiff and the court rendered judgment for the plaintiff.

Now, do not think that there should be any disturbance of this judgment. We do not find any error for which we ought to interfere.

We then affirm judgment.

R. J. Winters, for plaintiff.

F. J. Wing, for defendant.

## JUSTICE OF THE PEACE—TRANSCRIPTS—JUDGMENTS.

[Cuyahoga District Court, March Term, 1879.]

AUGUSTIN MATZAUN v. THE STATE OF OHIO.

A judgment rendered by a justice of the peace in a criminal case may be reversed on error for insufficiency of the transcript in not showing that there was any information, plea, trial, verdict, or judgment.

WATSON, J.

In this case we find this condition of things: The plaintiff in error was prosecuted in the probate court on the charge of obtaining money by false pretenses, and as a general result, got into jail at the end of the prosecution. This is a petition in error brought rather to review the situation than anything else. The petition assigns various errors, and it is based upon the proceedings of the probate court and for those proceedings we are referred to a paper that is made a part of the petition, and is said to be a copy of the record referred to in the petition. That record is in these words, substantially: Transcript filed October 24, 1877. Information: Continued from term to term, and continued to January, 1878 term. January 7, 1878, to the court, and the court fine defendant \$25 and costs. Motion for a new trial overruled. January 15, 1878. *Causare* issued by order of the prosecuting attorney. Then it says—"certified to the county auditor January 10, 1878," and "H. P. Bates, J. P.," written on the page above that. Then we find these marginal notes: "Costs." Then there is the judge's costs, the sheriff's costs, the prosecuting witnesses' costs, and transcript \$33.35, witnesses \$18.90, and fine \$25, making an aggregate of \$81.73 and judge's increase 40—

Now, I have read everything that is in that paper, and the plaintiff in error commences assigning errors, and it is assigned that there was no information; that the information was not read; in other words, there was no arraignment; that there was no plea; that there was no trial; that there was no verdict; that there was no judgment. And we are asked to reverse this catalogue of nothings. The trouble we have had in it, is, we find nothing under the sun to reverse, and the plaintiff in error is in jail; and we have determined that we will render a judgment of reversal of these nothings, and relieve the plaintiff in error from her duress, imprisonment, and let the thing rest at that. (*Sotto voce* to his associate on his right: Hadn't I better add a recommendation to mercy?)

Mr. Hutchins. I might suggest that in that part, like the rest of it, the opinion of the court amounts to nothing, as the plaintiff never was in jail.

Court. Well, we note here "judgment reversed" and we will leave to those who may be interested in it to find the judgment and



plaintiff discharged from imprisonment. There is nothing to remand, and nothing to do, and that order, I think will dispose of it.

A. M. Jackson, for plaintiff.

J. C. Hutchins, for defendant.

### BILL OF EXCEPTIONS—JUDGMENTS.

[Cuyahoga District Court, March Term, 1879.]

#### HARBAUGH V. BATES.

A judgment will not be reversed on exception to a charge of the court when the bill of exceptions shows only an isolated part of the charge, which can be construed to sustain the verdict, and must have been so understood by the jury.

HALE, J.

This case comes here by a petition in error. Two grounds are relied hereupon for the reversal of the judgment; first, that the verdict is not supported by sufficient evidence; second, that there was error in the charge of the court. The action in the court below was on a promissory note made by plaintiff in error, Harbaugh, payable to the order of D. W. Caldwell, which was for \$200, dated July 27, 1875. The petition was in the ordinary form of a petition upon a promissory note under section 122 of the code.

The answer of Harbaugh alleged that the note was wholly without consideration. He says that he gave this note to Caldwell in consideration that Caldwell was to enter his services as a solicitor for life insurance; that he was the general agent for a life insurance company here in the city of Cleveland, and Caldwell was to enter his employment as a solicitor for life insurance. That he failed and refused to enter upon the service contemplated at the time this note was given. I am not sure but it ought to be without consideration upon grounds of public policy.

They go to trial; Harbaugh testifies that he was the general agent of a life insurance company; that he made this arrangement with Caldwell to enter his services, that Caldwell neglected to do so, and, therefore, the note is wholly without consideration. Caldwell upon the trial testified that he made a conveyance of land to Harbaugh in consideration of the note.

There is very little outside the testimony of these two witnesses that will aid in solving the question, who is right about it. It depends very much upon the credibility of those two witnesses. Of course they were before the jury. One testified squarely against the other, and we think it is not in any condition to be disturbed by a reviewing court upon the ground that the jury was wrong in the finding made.

The other objection to the judgment is, that the court erred in the charge, and all there is about it in the record is that the court instructed and charged the jury among other things as follows, to wit: "If security was given for the debt, it cannot be claimed that it was without consideration; if a conveyance of land was made as security, then there can be no failure of consideration, unless it be shown that the title to the land failed." While the court speaks here of a security under the testimony offered, it must have been intended by the court and understood by the jury to mean, if the consideration of this note given by Harbaugh to Caldwell was the conveyance of land by Caldwell to Harbaugh, then there was a good consideration for the note unless the title to the land failed. There was no other claim that could be made upon the testimony; no claim that Harbaugh had secured this note to Caldwell. And while the term security is used here, it must have meant the consideration of the note. It must have been so understood by the jury. And from these isolated sentences, one or two having been taken out, we are not able to say that there was any prejudice growing out of this charge.

The judgment of the court below will be affirmed.

Hord, Dawley & Hord, for plaintiff.

Bates & Hammond and A. T. Brown, for defendant.

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## \* MUNICIPAL CORPORATIONS.

[Belmont Common Pleas, October Term, 1878.]

## DANIEL W. CADY V. VILLAGE OF BARNESVILLE.

A municipal ordinance against walking or riding with any lewd female, or to stand and converse with her on any public ground within the corporation is not authorized by section 1692, Revised Statutes, giving power to punish lewd and lascivious behavior in the streets and other public places, and such ordinance is unconstitutional and of no legal effect.

The plaintiff in error was arrested by the marshal of the village of Barnesville on the 9th day of May, 1878, under an ordinance of said village, the 4th section of which reads as follows:

"That it shall be unlawful for any male person to walk or ride in company with any lewd female or common prostitute, or to stand or converse with her upon any street, alley, lane or public ground within the corporate limits of said village."

Upon the trial before the mayor, the plaintiff in error pleaded guilty to the charge of walking and conversing with a certain woman, but denied any knowledge of her character. Thereupon, the mayor fined the plaintiff in error, and adjudged the costs against him. To reverse the judgment, the petition in error was filed at the court of common pleas. Plaintiff, by his counsel, maintained:

1. The incorporated village of Barnesville had no power to

pass the ordinance in question either expressly or arising from implication. Section 199 of the municipal code, passed May 7th, 1869, provides that corporations shall have power to "suppress and restrain disorderly houses and houses of ill-fame, and provide for the punishment of all lewd and lascivious behavior in the streets and other public places." Walking and conversing with any woman is not an act of "lewd and lascivious behavior."

2. The ordinance is in conflict with article 1, section 1, of the constitution of Ohio.

3. The ordinance is in conflict and is inconsistent with the general laws of the state (chap. 9, sec. 2; Crim. Code, also chap. 9, sec. 8; City of Canton v. Nist, 9 O. S., 442.)

4. The ordinance is indefinite and uncertain. The ordinance provides that "any male person," etc. A child three years of age would be liable, if the ordinance was of legal effect.

5. The ordinance is void because it does not require a *scienter* as the gist of the supposed offense.

OKEY, J.

Held that the ordinance was unconstitutional and of no legal effect; that it was unauthorized by the municipal code, conferring powers on municipal corporation by the legislature, and being inconsistent with the other laws of the state, was void. The judgment of the mayor was therefore reversed.

B. D. Sinclair, for plaintiff in error.

J. W. Walton, contra.

#### \*OFFICE AND OFFICER.

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[Cuyahoga District Court, March Term, 1879.]

#### THOMAS M. TILLEY V. CITY OF CLEVELAND.

A doorman at a station-house is not a patrolman, and may be removed at the discretion of the board of police commissioners under the police law (73 O. L., 48), without charges being preferred against such officer.

TIBBALS, J.

The only question on the record in this case is made on demurrer to the amended petition filed below by the plaintiff in error. The petition briefly states that on the 19th day of April, 1876, the plaintiff was appointed doorman at the Central police station by the board of police commissioners of this city; that he duly entered upon the discharge of the duties, continuing to hold that position until the 27th day of September of the same year, when, without notice or trial, he was deprived of his insignia of office and notified by his superior officers that his services were no longer required; that he was discharged. He avers that he reported daily, for a long period, prepared to render necessary service to the board, and that in the month of March following he presented his claim for wages

and demanded a proper certificate from the board, which was refused. They still refuse to give him a certificate that he may draw his pay, and his suit is for the wages during that time.

The question made by the demurrer is simply whether this statute, authorizing the organization of the police force of the city and providing for the appointment of patrolmen, covers his case, so that he, in fact and in law, was a patrolman within the meaning of the statute. If that be so, then he has been deprived of his office without being notified, without charges being preferred in writing and without a trial. Of course, the demurrer admits that this has not been done. The statute on the subject is to be found in the 73d volume of the Ohio Laws, 5, 8, 9 and 10 sections, page 48, and has been referred to as decisive of the question. By the 5th section the board of commissioners is authorized to make the appointment of various officers, superintendent, captains, lieutenants, sergeants, patrolman, the number being limited according to the population. They are authorized also to appoint special patrolmen to be reported to and approved by the council. They are authorized to detail from this force certain detectives who shall act as secret police, and the mode is prescribed as to how these appointments are to be made, from those most meritorious of the police in the service. Then following that general authority to appoint is this provision: "Said board shall also appoint such suitable persons to act as doormen, janitors, attorney of police, and telegraph operators, as the demands of the service may require, and who shall receive such compensation as the board may determine; in no case, however, exceeding the salary paid patrolman. Said board shall also have power, for cause, to be assigned on a public hearing, and on due notice according to rules to be promulgated by them, to remove or suspend from office, or for any definite time deprive from pay any member of such police force; to make rules and regulations for the government and discipline of said force, and shall cause the same to be published, and to make and promulgate general and special orders to said force through the superintendent of police."

Now it is claimed under this section that this doorman is a member of the police force; therefore, he is to be deprived of his office in the same manner prescribed by the other section as to all of the policemen. It will be observed that thus far there is no mode pointed out as to the manner in which these parties are to be tried. But the 8th section provides this provision: "The qualification, enumeration and distribution duties, mode of trial and removal from office of each member of said police force shall be particularly defined and prescribed by rules and regulations of the board of police; and no person shall be appointed to or hold office in the police force aforesaid who is not a citizen of the United States and a resident of the city; and provided that no superintendent, captain, lieutenant, sergeant, \*or patrolman shall be removed therefrom, except on written charges preferred against him

to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city pending the hearing of the charges preferred against him; and provided," etc., as to other matters. Section 10 provides:

"Any citizen of any such city, with a view to the trial and suspension or removal from office of any officer or patrolman of the police force may, on oath, in writing, prefer or make, before the board, charges or complaint touching the character or competency, or affecting the acts, conduct or omission of such officer or policeman, or for violation of or misconduct, as defined or prescribed by the rules and regulations of the board, and said board, after reasonable notice in the discretion of the board, to the person charged, shall proceed to the trial of said officer or policeman on said charges or complaint."

Now it will be discovered at once that there certainly has been described in these sections more officers or persons than are designated as officers and patrolmen. It will be found also that the parties entitled to this written notice to the charges to be preferred in writing are limited to the officers and patrolmen; indeed, they are all limited. They are designated as "superintendent, captain, lieutenant, sergeant, or patrolmen," who shall not be removed except by this mode.

Now it is said that a doorman is a policeman—a patrolman. If that be so, then we are at a loss to give a construction to this section. First, here is a provision, after the general provision for making these appointments, that the "board may appoint as many special patrolmen as the exigencies of the case may require." What shall be said of that? Are they patrolmen in the general sense of the term, who shall hold their office during good behavior, and shall not be removed except upon written charges! It would seem that the board ought not to be hampered by any such construction of the statute. It may be necessary to appoint for a few days a large number of special patrolmen, many more than the needs of the city for general purposes would demand. Yet if this construction is true, these patrolmen would be entitled to this formal proceeding before the city could retrieve itself of the burden of that unnecessary number of officers. Again, here is a provision that the board may detail for special work, denominated secret service, secret police, and that they are to be detailed from its regular patrolmen of the city in the order of merit. Then this provision would be entirely unnecessary, because if the doormen were patrolmen it would clearly be within the power of the board to detail to this special duty a doorman, or any number that they might need for their stations. But it seems to be an additional power: "Said board shall also appoint such suitable persons to act as doormen, janitors, attorney, telegraph operators, as the demands of the service may require."

Now there may be times when they will need more doormen

and janitors, and more attorneys, and more telegraph operators than at other times, and if such an emergency should occur, it would seem, under the construction claimed for this section, that they must all receive this notice in writing and be publicly charged and tried before their services can be dispensed with. But if that claim is true, there is no more authority for removing a doorman without these public charges than there would be for removing an attorney whose services may be required and may not. It is entirely in the discretion of the board to call to their aid those services, and yet would it not be rather a singular construction to place upon the statute that, because an emergency arises requiring the employment of an attorney, that that attorney could fasten himself upon the city for all time until he had been publicly tried. For what would he be tried? I should trust no emergency would arise requiring the trial of an attorney in order to his removal.

Again the same reasoning will apply to janitors. Can it be said that janitors whose services may be needed during the winter, perhaps twice or three times the number required during the summer season, when spring arrives and their services are no longer needed, charges must be prepared? What would those charges be? That warm weather had set in and therefore they could not properly discharge their duties.

The construction contended for would certainly lead us to a very unnatural rendering of this section.

But, it is claimed, because the general term used in the 8th section refers to all of them, that it must include all. The limitation of the 5th and 8th sections must be taken together, for neither section is complete without the other. The one provides for the organization and the adoption of the rules, and the other prescribes the mode in which their trial shall be conducted and the manner in which they may be discharged.

Now, we feel very clear that upon this point this party is without any remedy; that it is not, and ought not to be considered the policy of the law, where parties are employed for this general service, that the appointing power is without authority to dismiss them when occasion may require.

There may be good reasons—indeed, there are good reasons—why these officers and patrolmen ought to be taken out of the power and influence of parties, for their services are rendered to the public, for the protection of the public peace, and the good government of the city, and they ought not to be in the control of any political party or power. Hence the wisdom of that provision that these men by their long and faithful service, by their competency as shown by that service shall be retained in their places, except charges shall be sustained against them. But no such construction can apply to a mere doorman whose duties are dissimilar to those of a general patrolman, or from any of the other officers.

It therefore follows that the demurrer was properly sustained.  
A. M. Jackson and G. C. Dodge, Jr., for plaintiff.  
Heisley, Weh & Wallace, for defendant.

### BILLS AND NOTES — EVIDENCE.

[Cuyahoga District Court, March Term, 1879.]

E. D. STARK V. E. P. BENTON ET AL.

It may be shown by parol evidence that one apparently an indorser on a note is really liable as principal debtor, and that no demand and notice was necessary in order to make such party liable.

WATSON, J.

The action in the court below was brought upon the following instrument :

“CLEVELAND, July 31, 1875.

Sixty days after date I promise to pay to the order of Robert Holmes one hundred and twenty-five dollars, at the First National bank.

(Signed),

BYRON G. BURTON,

And endorsed,

ROBERT HOLMES.”

Now at the trial of the case, in explanation of the relations of the parties, the plaintiff offered to prove that the note upon which the action was brought was given by defendant Burton to Holmes, and to him in renewal, and to satisfy and take up a note for the same amount held by the plaintiff and made by the defendant Burton and endorsed by the defendant \*Holmes. “That, first, said note admitted to have been endorsed by Holmes as accommodation endorser for Burton, was endorsed 107 by the plaintiff, and sold by him to E. W. Goddard, who held the same when it became due; that the same was duly protested for non-payment, and that notice of demand and non-payment was duly and legally made upon the plaintiff Stark and defendant Holmes as endorsers; that the said Stark had been compelled to pay and take up the same upon the demand of the said Goddard, and had then demanded payment from the said Holmes as his prior endorser to the said Burton, the maker, and that instead of paying the same, they, the said Holmes and Burton, gave to the plaintiff Stark the note upon which this suit is brought; but the court refused to hear the said evidence and ruled and held that the same was both irrelevant and incompetent as proof in the case, and did hold and rule that the defendant Holmes could be held only as an endorser, and as such was entitled to have the note presented for payment at the time and place where due, and was entitled to legal notice of the demand and non-payment and what parol testimony was incompetent to show that the liability of the defendant Holmes was anything other than that of endorser.” To this exception was taken

and the case is brought up on error, and these are the assignments of error: "That the court erred in ruling out the evidence offered by the said plaintiff Stark on the trial of said action, and in his ruling as to the law as set forth in the bill of exceptions herein."

The first assignment of Stark is that said judgment was given for the said Holmes when it ought to have been given for the said Stark according to the law of the land.

Now as it appears upon its face the presumption would be that this plaintiff was suing as endorsee, the maker and endorser of the promissory note. But we hold that that is by no means a conclusive presumption. This was an action between the original parties, but in order to show that this man was not an endorser but really a principal upon the note, a joint maker in the note, and that form of the note was adopted for the purpose of making the parties jointly liable to Stark.

Now we think it of very little consequence what the form of this paper was. The circumstances existing between these parties at the time the note was given was fair to be shown as between the original parties. No question as to the *bona fide* holder of commercial paper was involved. It was between the original parties. No question of public policy was involved in it. As between the original parties the plaintiff sought to show the relations that existed between them when this paper was given in order to enable the court to look at the case as these parties looked at it, and from the same standpoint that they viewed it, in order to determine what their intent was as to this paper, to see what reason there was for their making it in this form. We think that evidence was clearly admissible; that the relations of the parties under these circumstances should have been shown; we think these parties were, under the circumstances, joint makers. When this note was made, they were both indebted to Stark for the paper that had been taken up or had passed into the hands of Goddard. It is true, the one was liable as maker and the other as endorser of the paper, but there was a fixed, legal liability between the two, and they might be jointly sued upon it. We think then that when they got this paper up in this form they both became makers of the paper and that Holmes is a principal debtor in it and the payee or endorsee, Stark, need not make a demand and give notice, in order to hold him liable.

E. D. Stark, for plaintiff.

Henderson & Kline, for defendants.

[Cuyahoga District Court, March Term, 1879.]

LEWIS B. HARRINGTON v. THE STATE OF OHIO.

Where a person is on trial under an indictment for assault and battery, a verdict of guilty of assault is good, though it does not respond to the allegations of a battery.



WATSON, J.

We find that the plaintiff in error was prosecuted in the court below for an assault and battery. It is alleged that he made an assault upon Wm. Hall and then and there did beat, wound, strike and otherwise ill-treat him, Hall. No question was presented in the course of the trial as to the admissibility of the evidence or the charge of the court.

But this verdict was rendered by the jury: "We, the jury in this case, being duly empanelled and sworn, do find the defendant guilty as charged in the indictment of an assault," and there the verdict ended. It does not respond to the allegation in the information, that a battery was committed, and out of this verdict arises the only question there is in the case.

Now, an assault, we understand to be an attempt with a present purpose and the ability to accomplish it, to inflict a corporal injury upon another, unlawfully, maliciously, wantonly. A battery is complete when the assault is accomplished.

The jury cannot convict of a battery without convicting of an assault, but they may convict of an assault without convicting of a battery, and that battery includes the assault.

In this case the defendant is found guilty of an assault. It is claimed here in argument that he may be again prosecuted for a battery, as the verdict does not respond to the entire indictment. If the battery is part of the same act with the assault, he cannot be convicted of the battery, without being punished twice for the same act, although the verdict does not respond to the whole of the indictment, that would be the effect. We regard the verdict as a sufficient response to the charge made in the information 114 and we think the court has committed no error.

The judgment will be affirmed.

S. E. Adams, for plaintiff.

J. C. Hutchins, for defendant.

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### REPLEVIN—JURY—DAMAGES.

[Cuyahoga District Court, March Term, 1879.]

#### MERCHANTS' BANK OF CANADA v. A. B. CHAPIN, ET AL.

Where the plaintiff in a replevin proceeding fails to appear, the defendant, with the assent of the court, may waive a jury, and the court finding for him may assess his damages without a jury.

HALE, J.

This case is brought here by a petition in error. Two grounds of error are relied upon. It seems that in September, 1873, Richardson and Wardsworth made an assignment to A. B. Chapin for the benefit of creditors. The plaintiff in this action made a claim against the estate and against the assignors which was disputed by

the assignee and by the assignors. The statute provides that when a claim is rejected by the assignee that action must be brought within thirty days, and if the claim is established, the judgment of the court is that it be allowed, the costs being in the discretion of the court. Instead of bringing the action under that statute against the assignee, the plaintiff brought this action joining the assignors, Richardson and Wardsworth, with the assignee. No objection was taken to the form of the action, and the case went to trial, resulting in the establishment of the claim, and verdict in favor of the plaintiff for something over \$600. The court, treating the action as severable, rendered judgment against the assignee—that the claim be allowed against the estate, and in its discretion, charged the cost of establishing the claim against the assignee to the plaintiff (and the plaintiff paid it), and rendered judgment for the entire claim against the assignors, Richardson and Wardsworth, together with the judgment for costs for something over \$30. The assignee, although the claim had been established, neglected to pay upon that claim the dividend to which the plaintiff was entitled, and action was brought upon the bond of the assignee against the assignee and the surety, and it is the rulings in that case of which complaint is made. The first is this: The plaintiff claims that the claim and costs incurred against the assignors should be the sum upon which it should receive a dividend, while the defendant claims that the extent of the dividend should be upon the claims excluding costs. The court below held that the claim as established, the judgment excluding costs, should only share in the dividend, and it is claimed that the court erred in so holding, and I understand counsel to concede that the case stands precisely as it would had the plaintiff commenced a separate action against the assignors after the assignment to establish his claim against the assignors, that in that case he would be entitled to a percentage upon the costs as well as upon the claim.

It will be borne in mind, that to establish this claim against the assignee, the statute provides that suit may be brought against the assignee, leaving the question of cost in the discretion of the court. We understand that when the assignment was made for the benefit of creditors, it was for the benefit of the then existing creditors, and that the assignee refused to allow the claim and the plaintiff to share in that trust fund.

The statute provides a mode in which that question should be determined, leaving it in the discretion of the court to apportion the costs. That trust fund, in our judgment, should only be chargeable with the cost incident upon establishing the rights of the claim to share in that trust fund. The party might pursue the assignors, if he saw fit outside. It does not bar his claim against them. They may have accumulated property after the assignment, which he desired to pursue and subject to his judgment, but when the trust fund is charged with the cost and expense of establishing the claim against the assignee, to that extent only can the assignee be liable

for costs. If the other doctrine is held that in establishing this claim against the assignee, it is in the discretion of the court to make the plaintiff pay the costs; or as against the assignor that the assignee should pay the costs it would be, in our judgment, as inconsistency. We do not think the court erred in that holding. But it seems that after this action was commenced upon the bond, the sureties upon that bond, after the case had been in court for some time, paid to the attorneys of the plaintiff, the amount the plaintiff was entitled to, if this question of costs was excluded, and it was stipulated in the receipt given that it should be without prejudice as to the costs or anything else in the case, and they litigated the case farther as to whether this question of costs should come in, resulting against the plaintiff's claim in that behalf.

The court below refused to allow a recovery for costs; held that judgment must be for the defendant and that plaintiff must pay the costs. At the time the action was brought the situation was this: The plaintiff had a good and valid claim; he commenced his action upon it; it was afterwards in part paid. But at the time the payment was made he was entitled to his claim and the costs made up to that point in establishing it; and the receipt specifically saves to him that right. We think that the finding of the court, should have been that at the time of the commencement of the action the claim existed precisely as it did exist, that after the commencement of the suit so much had been paid upon it, and that plaintiff was entitled to his judgment for costs up to the time he received that payment; and for that reason we think the judgment was wrong, and to that extent it may be modified, rendering the same judgment here that should have been rendered in the court below.

Mix, Noble & White, for plaintiff.

G. H. Foster and A. W. Ransom, for defendant.

### ASSIGNMENT FOR CREDITORS.

[Cuyahoga District Court, March Term, 1879.]

†E. S. HOLKINS, ET AL. V. CORNELIUS DONAHUE.

If, in an action against the assignee to establish his claim, the creditor joins the assignors and gets judgment against them also, the trust should not be charged with the cost of so doing, and the court may charge the costs upon the creditor, and if afterwards the assignee refuses to pay the dividend, and suit is brought on his bond and the sureties pay the claim, they must also pay the costs of this latter suit.

Error to the court of common pleas. This was an action of replevin. At the January term, 1878, of the court below, the case came on for trial, and the plaintiff failing to appear, the defendant, with the assent of the court, under section 279 of the code, waived

†This case reverses 1 Cleve., 123.

a trial by jury and tried it to the court, and the court rendered judgment for defendant for \$122.50 and costs.

At the next term the plaintiffs appeared by counsel and moved to set aside the judgment because the defendant's damages had not been assessed by a jury. And the court sustained the motion and set aside the judgment to which the defendant excepted and took the case to the district court.

The district court reverse the action of the court below in setting aside the judgment and affirm the judgment.

W. C. Rogers, for plaintiffs in error.

Gollier & Brand, for defendant in error.

[Cuyahoga District Court, March Term, 1879.]

GOTTFRIED RITTBERGER ET AL. v. JACOB FLICK ET AL.

Though the mere non-user of a road for a period less than twenty-one years may not amount to an abandonment, yet where the facts show that it was agreed that an owner should dedicate a new way, on condition that the old be closed, though the trustees had no power to so agree; yet after the new dedication, the closing of the old road will be held to amount to an abandonment.

HALE, J.

This case presents an interesting question and one, as we apprehend, not definitely passed upon by our supreme court. The case was tried in this court upon an agreed statement of facts. The plaintiffs seek by injunction to restrain the trustees of Newburgh and Bedford townships and a supervisor of a road district within one of those townships, from opening across the lands of the plaintiffs a highway claimed to be a part of an old state road laid out many years ago. From this agreed statement of facts it appears that on the 20th of January, 1823, the legislature of the state authorized the laying out of a state road leading from Cleveland to the Ohio river. The agreed statement of facts does not disclose just when or along what line the road thus authorized was laid out, but a road was opened running from Cleveland to the Ohio river passing through the townships of Newburgh and Bedford. The road in 1859 had been used by the public, according to the agreed statement of facts, more than 21 years, that is, the part here known as the Cleveland and Bedford road. This road, in passing through the township of Newburgh, passed through lands owned by one A. L. McCurdy, and over and through a steep hill. In 1859, this road, at each edge of the hill, was fenced up, and a new route opened at about the base of the hill, diverging from the old route at one side

and meeting it at the other. That change was commenced in the fall of 1858, and was completed in the spring of 1859. On the first of June, after the new route had been used for public travel, the trustees of Newburgh township entered into an agreement with McCurdy, who owned the land over which the old road passed, also the land which was appropriated for the new route, and in that agreement McCurdy covenants to donate the land then in use for the new route and the old road was to be fenced up, and it was fenced up at that time, the trustees paying McCurdy for doing the work and fencing it up. From that time on the road has been used as a road, and been improved by the public as a highway. In 1878, it became necessary to lay out a county road, connecting with the state road at this point, and the commissioners starting at the initial point for that county road, commenced in the road as then designated "The Cleveland and Bedford Road." McCurdy allotted the land he owned with reference to this new route, sold it and made conveyances of the same as bounded by the state road as then made. The grantees, these plaintiffs, have entered into possession of the lands thus conveyed to them, and have improved them with reference to the new route, building a portion of the house and a portion of the barn, and digging a well upon the old road, both the public and the owners of the property treating this change as a permanent one. Now after nineteen years the successors of the trustees, and the supervisors, who entered into the agreement, seek to enter upon the old line and establish and open up to the public the state road as formerly used prior to 1859, notwithstanding the improvements and the action that has been taken in respect to it.

Now, we place no very great reliance upon the agreement, as such, between the trustees and McCurdy. We do not suppose that the trustees had any power to contract or otherwise to vacate that road. But how stands this new line as a dedication? The public have used and improved it for nineteen years. The supervisor each year worked upon it. Other roads have been connected with it, and this county road in no way could get connection with this state road except through this new route. The owners of the property have improved their property with reference to it, sold and conveyed with reference to it, so that I take it there can be no two opinions that the new route of this state road has become dedicated to the public in a way that McCurdy and his grantees are bound by it, and that must stand as a fixed fact. No matter what is done with the new route, the old must stand as the road or as a route, under well settled rules as to facts that would constitute a dedication.

Now, as a part of that transaction, this old route was given up by the public and has been abandoned, the public have made no claim to it for a great length of time. The owners of the land over which it passed have improved it as private property, building upon it, and improved it in every way—made it a portion of an allotment. Now, if it is said this new route shall be dedicated to the

public, and the public shall hold the old route and the new, it is subjecting the land of these persons to a new service, when, in fact, they gave up the one that they might have the other. While we are not prepared to hold that the simple non-user of the road for a period less than 21 years would operate as an abandonment by the public, we are prepared to hold that that is an element to be taken into consideration in determining whether the public have abandoned the road, and that the abandonment of the road may be inferred from a non-user for a period less than 21 years in connection with other facts and circumstances, which clearly indicate on the part of the public the intention of abandonment. In this case we hold the facts and circumstances to be such as to authorize the court to hold that there was an abandonment of the old route on the part of the public. It would be grossly inequitable, in our judgment, to make any other holding in the case, and while it may possibly be necessary under the rules of law to do so, we are disposed to pass it along to the next court to make that holding.

The decree will be that the injunction be made perpetual.

Stone & Hessenmueller, for plaintiffs.

Henderson & Kline and Mix, Noble & White, for defendants.

## 121 \*HUSBAND AND WIFE—SALES—EVIDENCE.

[Cuyahoga District Court, March Term, 1879.]

O. H. P. HICKS ET AL. V. WILLIAM CUBBON.

1. Where a wife gives a bill of sale of her husband's property, in his presence, it is error to charge that such bill of sale is as binding on the husband as if he had signed it; as this fact is for the jury to determine as a matter of estoppel.
2. Parol evidence is admissible to show that the consideration of one dollar recited in a bill of sale is in fact a larger amount.

HALE, J.

The action below was an action in replevin brought by William Cubbon to recover certain personal property claimed by virtue of a bill of sale or chattel mortgage, a copy of which is attached to the bill of exceptions. That instrument was filed with the recorder of this county, I suppose, as a chattel mortgage, but there was no affidavit upon it showing the consideration, other than it recites that it is in consideration of one dollar; and it is signed alone by Mary Clark, the wife of George E. Clark. The defendant Hicks was a constable. An execution had been placed in his hands against George E. Clark, and he levied upon the property in question under that execution as the property of George H. Clark, and the controversy in the action was whether the plaintiff Cubbon should hold this property by virtue of his bill of sale executed to him by Mrs. Clark or whether the constable should hold it by virtue

of his levy, made upon the property as the property of George E. Clark. The question then was, first, whether Clark or his wife owned the property, second, whether the plaintiff below by virtue of the instrument executed to him by the wife got such a right in the property as he could hold it. The bill of exceptions does not disclose all the testimony, but it shows that the plaintiff below gave evidence tending to show that the property belonged to Mrs. Clark; that this instrument was executed to him and he received the property as absolutely his in payment of a debt of one thousand dollars which Mrs. Clark and Mr. Clark owed to him; \*that the con- 122 sideration, although recited in the instrument as being one dollar, was really the payment of a debt of one thousand dollars; and gave evidence tending to show that Mrs. Clark owned the property; that the fact that the instrument was filed as a chattel mortgage was simply at the instance of Mrs. Clark and not at his own; that he knew all the time that he had the absolute ownership of this property and he rested his case.

Then the defendant Hicks, to maintain the issue on his part, offered evidence tending to show that Clark owned the property, and then further asked Clark, who was upon the witness stand, "What was the consideration of the bill of sale of December 8, '75, and for what purpose was it given?" Bear in mind that the instrument under which the plaintiff below was claiming recited, the consideration as being one dollar. On the trial he had undertaken to explain the consideration and to show that it was one thousand dollars and that he received the property for the one thousand dollars and it became his absolutely. Then this question was put: "What was the consideration of that conveyance?" An objection was interposed to this question and the court sustained the objection. How there could be a shadow of a doubt as to the competency of that question is more than we can see. Three or four answers could be given to it. The consideration of that instrument was open for explanation at any time. There was plainly an error, we think, in that ruling. Again, the court seemed to think that the jury might go wrong and might find this property to be the property of Clark, and that would defeat the plaintiff below, so to cover that contingency and to have this instrument, although not signed by Clark, upon this property and convey it to the plaintiff below, notwithstanding it belonged to Clark, the court of its own motion charged the jury as follows: "That if George E. Clark was present, when said written instrument was executed and delivered, and assented thereto, it was as much his instrument, and he was as much bound thereby, as if he had executed and delivered the same by his own hand to the defendant." That is, the plaintiff was claiming under an instrument executed by Mrs. Clark, signed by her alone. The court does not say that certain facts might intervene that would estop Clark from claiming this property himself, but says that if he was in the room when his wife signed this chattel mortgage or bill of sale he was just as much bound by it as if he had signed it him-

self. We think there is error in this, and the judgment will be reversed.

W. C. Rogers, J. W. Heisley, for plaintiff

W. S. Kerruish, and Gollier & Brand, for defendant.

### VENDOR AND PURCHASER.

[Cuyahoga District Court, March Term, 1879.]

MILAN D. WIGGINS ET AL. V. M. N. CAMPBELL ET AL.

Where a person having a contract for the conveyance of certain lands, and being in possession thereof, executes a mortgage thereon in the usual form, and afterwards assigns such contract, such mortgage is *pro tanto* an assignment of the contract, and if the assignee of the contract pays the balance of the purchase money, and takes a deed with notice of the mortgage he holds subject thereto except that his payments to the holder of the title are the prior liens.

HALE, J.

This case was tried in the early part of the term and presents some difficult questions. The facts, so far as it is necessary to note them, are these: On the 24th day of May, 1872, E. F. and L. R. Payne were the owners of lot seven in their allotment in Newburg, and at that date executed and delivered a contract of the lot to a man by the name of Ward, who went into possession of said lot seven on the 11th of April, 1873, and assigned that contract to M. N. Campbell, and M. N. Campbell took possession under it. On the 3d of March, 1873, the Payne brothers executed a contract of lot nine in the same allotment to a man by the name of Charles Wright, who assigned that contract to Winslow Wright, and on the 3d of October, 1873, Winslow Wright assigned the contract to M. N. Campbell, so that M. N. Campbell thus became the equitable owner of lots seven and nine in the Payne allotment, and went into possession thereof. Being thus in the possession, holding the contract, and having paid a considerable portion of the purchase money, on the 11th day of January, 1874, he executed a mortgage to the plaintiff, Milan D. Wiggins, to secure the payment of four promissory notes. That mortgage is in the ordinary form of a mortgage upon real estate. Those notes became due on the 15th of July, 1874, on the 15th of January, 1875, the 15th of July, 1875, and the 15th of January, 1876, respectively. The first of those notes has been paid, the one due July 15, 1874. The second note is owned by the plaintiffs Runnals and Wiggins. Some contest was made as to that, but it was conceded in the argument that that must be the finding. The last two notes are owned by the defendant, A. J. Wenham, and that was conceded in the argument. On the 9th of February, 1875, M. N. Campbell assigned to his brother, William Campbell, these two contracts that he had for lots seven and nine, more than a year after the execution of the mortgage. Now, we suppose it to be



settled by the case of *Churchill et al. v. Little et al.*, 23 Ohio St., 301; that the execution of a mortgage by a contractee upon property held by him, by land contract operates as an assignment of the contract, so that under the mortgage in this case, Wiggins became the assignee of M. N. Campbell of the contract, and of his equitable interest in the property to the extent of the mortgage, and when the assignment of the contract was subsequently made to his brother William, he also became the assignee of the equitable interest that was left, and the situation of the respective parties at that time was this: The Payne brothers held the legal title to those two lots in trust, first, for the payment of the amount due to them; second, the amount due upon the mortgage; and third, the amount due to William Campbell. That was the legal effect as it then stood prior to the transactions, we shall refer to hereafter. On the 26th day of March, 1875, a little more than six weeks after the contract was assigned to William Campbell he paid up the contracts to Payne brothers and took a deed of these lots, an absolute conveyance to himself, thus clothing his equity with the legal title; so that while he had an equitable interest in those lots, prior to March 26th, 1875, he did not acquire the legal title until that date.

Now, we find, as a matter of fact, at the time the assignment of the contract was made to William Campbell he did not have actual notice of this mortgage, and it not being an instrument, considering the state of the title, that was required to be recorded, no constructive notice can be chargeable to him. Then the question presents itself whether William Campbell had actual knowledge of this mortgage at the time he took the conveyance from Payne brothers, and thereby acquired his legal title. To determine this question we must look into the transaction between these two brothers. William Campbell resided in the state of Iowa and is, perhaps, a man of some means in that state. M. N. Campbell resided here. The property was here. He went to Iowa, and the assignment of the contract took place there. William Campbell says that he agreed to pay his brother \$5,000 for the property, and upon looking into the transaction we find it was paid in this way: (1) An old debt of a thousand dollars that had existed for a long time and barred by the statute of limitations in the shape of an account and a note. Neither the note nor the memorandum, which he says contained the account, is produced. (2) A note of \$1,400 due in one year, which, to meet the exigencies of this case, he paid within two months; but that note is not produced. (3) Another note of \$1,260 due in two years, but that is not produced. (4) \$1,363 in cash, and of that \$500 was going to Payne brothers for balance due them on land contract. William Campbell, in his testimony upon the witness stand, said that he did not have notice of the mortgage at the time he took the deed; but looking into a deposition that he gave formerly, and which was evidence in this case, we find that he there says that within two or three weeks after the transaction in Iowa, after his brother returned

to Ohio, that his brother wrote him all about the mortgage and condition of affairs, and that the deed was not received for more than six weeks afterwards. We think, under the circumstances of this case, I am myself very clear, although the court are not entirely unanimous upon the proposition, that William Campbell, at the time he received the deed, should be charged with actual knowledge of the existence of that mortgage. Then what are the rights of the parties? It is conceded that Payne brothers held this legal title in trust for the amount that was coming to them, and for the equities that were outstanding in favor of the Wiggins mortgage, and in favor of William Campbell. The mortgage was prior in time to the assignment of the contract, and conceding the latter to have been a *bona fide* transaction, the equities were equal, except that the one represented by the mortgage was prior in time. Then if a suit had been brought by the Payne brothers their's would have been the first equity, the mortgage next, then the equity of William Campbell. Now, if William Campbell received the legal title from Payne brothers with a knowledge of the situation he took it subject to the same equities and burdened with the same trusts. A transfer of the legal title from Payne brothers to William Campbell, he having knowledge of the equities of the case, would not change the situation. We hold that M. N. Campbell has the first lien for the amount that he paid to Payne brothers with interest thereon, that the mortgage securing the three notes, one in favor of the plaintiff and the other in favor of Wenham, is next, and the balance should go to William Campbell and the decree may be taken accordingly.

Tyler & Denison, for plaintiffs.

J. J. Carran, for defendant Wenham.

Critchfield & Peck for defendant Campbell.

## 125 \*FIRE INSURANCE—CONTRACT—PLEADING.

[Holmes Common Pleas, March Term, 1879.]

### JUDSON L. HUGHS v. FARMERS' INSURANCE CO.

1. A contract of insurance is complete on the settlement of the terms with an agent authorized to contract and the policy is mere evidence, and if the agent agrees to take a note in payment of the premium, this is binding on the company.
2. A petition that sets out the contract of insurance and the issuance of a policy in accordance therewith, and which alleges performance of all conditions, sufficiently states a contract.
3. A pleader can refer to a former cause of action and make it a part of a second cause of action.

VOORHES, J.,

Petition set out contract with agent of defendant on March 17, 1874, to insure a barn at \$800, and application directs agent to answer all questions, blanks for which are on application.

A policy was issued on March 19, 1874, and the note given for premium was paid. On March 28, 1878, the barn was destroyed by fire. A policy of insurance is only evidence of the contract, and whether issued at all, immediately or before the loss or after matters not, as a recovery can be had without a policy. The rights are fixed at the date of contract.

I think, unless the intention is shown otherwise, that when terms were settled with the agent the insured was bound to pay the note and \*the defendant was bound to pay the loss if 126 a loss occurred.

On demurrer to petition which set out the contract and issuing of the policy in accordance therewith, and allegations of performance of all the conditions, can the defendant, who does not deny any allegations, but admits by demurrer the allegations, and who has the plaintiff's money, deny its liability? I think not. Demurrer overruled.

Can the pleader refer to a former cause of action and make it a part of a second cause of action?

If he makes the statement in the following cause of action that he makes it a part of his cause of action, I see no reason why he cannot do so. I will overrule the demurrer to the second cause of action.

Reed, Stilwell & Hoagland, for plaintiff.

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#### \*HOMESTEAD.

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[Cuyahoga Common Pleas, March Term, 1879.]

GEORGE E. CLARK v. O. P. HICKS ET. AL.

A debtor has the right to select in lieu of homestead the personalty levied on by an execution, and such debtor may replevy the personalty without regard to the fact that he may have other property which he refuses to disclose.

WATSON, J.

This was an action of replevin in the court below. From the bill of exceptions it appears that testimony was given in that court tending to show that the plaintiff was the head of a family, a resident of Ohio, and was not the owner of a homestead, nor was his wife the owner of a homestead, and that all the property of any and every kind and description which he possessed at the time of the levy mentioned in the petition was about \$70 worth of personal property, besides the specific articles of personal property described in the petition, and there was testimony tending to show that said property was worth not to exceed \$270, and none was given tending to show that it was worth as much as \$400. There was also testimony tending to show that on the day said property was levied on by the defendants and before advertisement or removal of the same, suit

was brought and process in this case was served on the defendant in replevin setting forth as one of the grounds of replevin that said property was exempt from execution or legal process, and there was testimony tending to show that said plaintiff at the time of the said levy had personal property other than that described in the petition of a value greater than \$1,500, the whereabouts of which the plaintiff, at the time of said levy and at the trial, refused to disclose; and there was testimony tending to prove that there was a copartnership existing between the said George E. Clark and Mary Clark at the time of the said levy, and that the notes and chattels levied on were the property of said copartnership; and there was testimony tending to show that the plaintiff had suffered large losses to the amount of \$10,000 within the said time. In that state of the facts the court charged the jury, among other things, as follows: "It is denied by the defendant that the plaintiff at the time of the levy had no other property than this levied on, but it is said he had a large amount of other property to the amount of two or three thousand dollars, and has it yet secreted. It is for you to find out the truth of the matter. He might pay other debts with his property, but he could not put his property in some one else's hands to hold for him and then claim that this property levied on is exempt. But if you find that the plaintiff is the head of a family"—he gives here the test or rule to determine the question—"and not the owner of a homestead and has no other property but this, then it is exempt to him, unless it is partnership property, and the debt for which the officer levied was a partnership debt. Evidence has been offered tending to show that George E. Clark and Mary Clark were in partnership at the time and that this was partnership property. Now, if you find the fact to be so, then I charge you as a matter of law there can be no exemption against a partnership debt out of the partnership property, and George E. Clark could not then select partnership property as exempt."

Now we hold that in giving this test for the guidance of the jury in their deliberations there was error. It did not depend upon whether the party had other property. The question was whether he was the owner of a homestead and head of a family, and had put himself in a position to select this property as exempt, and had accordingly made the selection. The fact that he had other property did not cut him off from making a selection of this, for he could have selected this property or any other that he had in lieu of it. The question was not to be tested by the fact of the ownership of other property. This instruction is in the charge in chief, and is not of itself in a condition to be acted upon by this court in reviewing the judgment; but we proceed further with the case, and we come to the special instructions that were requested. This is the second request: "The plaintiff requests the court to charge the jury that the exemption laws of Ohio are to be administered and upheld without reference to either the ignorance, negligence, mismanagement or improvidence of the debtor asking the exemption

as a protection, and though the debtor's conduct in incurring the debts may be morally unjustifiable, nevertheless, the question in the administration of these laws is what the debtor has, not what he might have or I ought to have or we might suspect him to have"—which the court refused to charge and stated he had already charged the jury on that point, and charged that the jury might look into all the testimony for the purpose of determining the fact—whether the plaintiff had any other property, to which refusal to charge as requested and to the charge as given the plaintiff excepted.

Now the court could not be asked to make double charges. We take it for granted that the statement of the judge that he had sufficiently charged upon that subject is literally true, and in so far as the main part of this request is concerned it does not interfere with the judgment as it was rendered, but when he adds that they might look into all the testimony for the purpose of determining the fact whether or not the plaintiff had other property, we think, that in that the court gave a charge that ought not to have been given, but one which was well calculated, under the circumstances, to mislead the jury; for in the body of his charge he told them the question involved was whether the plaintiff below had other property, and that that affected the question of his claim to the exemption of the specific article he was then laying claim to. We think that should have been omitted. It was not necessary to the answer. He had answered in full the request, but there was then appended a remark which, taken in connection with the charge in chief, could not well help misleading the jury, and it may have resulted in a verdict that ought not to have been given. That, however, we cannot say, for we cannot judge of the facts. They are not before us. The case will be reversed and remanded.

Gollier & Brand and W. S. Kerruish, for plaintiff.

J. W. Heisly and W. B. Rogers, for defendant.

### VENDOR AND PURCHASER—MORTGAGE.

[Cuyahoga Common Pleas, March Term, 1879.]

†CALVIN W. RANNEY V. J. H. HARDY ET AL.

Where an owner of lots contracts to sell them on monthly installments, retaining the title till all payments are made, but he afterwards mortgages them to one who has actual notice of the purchaser's possession, but the purchaser does not have actual notice of the mortgage, continues to make payments to his vendor: *Held*, that his equity is superior to that of the mortgagee and he has a prior claim as to all payments made by him since the recording of the mortgage.

TIBBALS, J.

This case comes into this court on appeal. The plaintiff below filed his petition for the foreclosure of a mortgage on certain

†The judgment of District Court was reversed. See opinion 43 O. S. 157. But District Court opinion was not published.

premises described in the petition, dated May 9, 1872. The mortgage covers three lots in different sub-divisions in this city and they are known and have been treated in the case as lots 17, 28 and 67 in these different subdivisions. A large number of persons are made parties defendant who claim liens upon the premises. They file their several answers, making issues, and by far the greater portion of them have really no interest in the case, first, because it is conceded that in no event can their claims be reached, the property being inadequate for that purpose, and there is no contest over a large portion of them. The points which have been urged and which are in dispute are few. Briefly stated the facts are these: The lands were owned by J. H. Hardy, and in point of priority of time, it is conceded that on the 23d of April, 1872, Hardy, by contract, sold lot 17 to one McKennon, who by virtue of the contract, entered into possession of the lot and premises, and who in time transferred his contract to Scanlon, and Scanlon in turn to Caldwell, who are now both answering defendants. The possession has been continued in those three parties ever since the making of the contract and taking possession under it. Payments, however, were made on it to the extent of twenty dollars prior to the 9th day of May, 1872, at which time Hardy executed a mortgage to Ranney upon the three lots, 17, 28 and 67, thus covering the lot that had been sold to McKennon the month before. In August, 1873, a mortgage on lot 28 was executed to a Mrs. Yates, also including other lots not in controversy in this proceeding; so that the question arises mainly upon the priority of liens. Ranney is now deceased. On the 4th of May, 1874, by a written release upon the contract Ranney released lot 67 from the mortgage. It is claimed by Hardy and others having an interest in that direction that this was a mistake, that it was intended to release lot 17. That question of fact has been submitted to the court upon the testimony, and it is sufficient for us to say that while the testimony is somewhat conflicting, it appears that Hardy and Ranney both went out to examine these lots for some purpose, and after they returned to their office lot 67 was in fact released, and we have been compelled to come to the conclusion in view of all the facts that the proof is not sufficient to warrant us in holding, as against this written release of lot 67, that it was intended to release lot 17. We, therefore, hold against the parties desiring the correction of the alleged mistake in that regard.

The next question is as to the priority of the contract held by Scanlon \*or now by Caldwell, as against the Ranney mortgage. Upon  
131 that we are not fully free from doubt. It is a very close question. The proof shows that this contract was executed on the 23d of April, 1872, and that McKennon was placed in possession of this lot 17 by virtue of that contract—had open, notorious, exclusive possession; that is constructive notice to the world. At this time there was no lien upon the premises. On the 9th of the following month, as shown by the testimony, and not controverted, Ranney had actual knowledge that McKennon was in possession of

this lot, having gone with Hardy to examine the property, so that he took his mortgage with actual knowledge of that fact on the 9th of May. He placed the mortgage upon record, which, of course, as a general proposition, was constructive notice to everybody, and as a general proposition it is undoubtedly true that his claim upon the unpaid purchase money would be a prior claim. We have been cited to the case of *Jefferson v. Dallas*, 20th Ohio State, 68, by both sides; and it is not very much amiss to say that the case comes very nearly sustaining both sides. That is one reason why we are in trouble; but the reasoning of the court in that case has enabled us to reach a conclusion. In that case a young man, who was the owner of the premises, conveyed them to his mother by contract; he had paid a part of the purchase money, and thereafter was sued by a young lady for a breach of promise of marriage. While that suit was pending the mother paid the residue of the purchase price, and, as the court says, with full knowledge of the pending of the suit against her son, which subsequently went to judgment against the young man, and he executed his deed to her. The young lady sought to reach \$850 unpaid purchase money in her proceeding, while the mother undertook to quiet her title by claiming that she had the land by contract prior to the commencement of the suit and prior to the creating of any lien upon the premises by reason of the judgment. The court in that case held that to the extent of the unpaid purchase money it should be applied in payment of this judgment lien, and in doing so they use this language: "The legal title to the premises remained in the vendor, and the most of the purchase money remained unpaid until March 11, 1864, when, with full knowledge of the pending of the suit against her vendor, the defendant in error paid the residue of the purchase money amounting to eight hundred and fifty dollars and received a conveyance of the premises. Now it is claimed on behalf of the plaintiff in error, that to the extent of the purchase money remaining unpaid on the first day of the term, her judgment became a valid lien upon the lands in question; and the defendant in error has no equitable right to the discharge of such lien, and the quieting of her title, without accounting to the judgment creditor for this residue of the purchase money," and the court sustained that view of it.

It is claimed on one side that case is an authority even to hold that this mortgage having been placed on record on the 9th of May, 1872, and before the payment of a large amount of the purchase price by Scanlon or Caldwell, that it ought to that extent reach it; and as a general rule that would undoubtedly be true; but the courts certainly have held that this matter of determining the priority of equities is a matter depending upon the facts in each case. It does not follow any particular rule. While the general rule is, that the equities being equal, that which is prior in point of time shall be maintained, yet that a junior equity may be superior in point of merit; and with that well settled principle we have undertaken to dispose of this question. Now, it is fair to presume that

McKennon before purchasing these premises investigated the title, and if so, he certainly found it clear as to this lot 17. There was no encumbrance upon it. He then would take his contract and the question then arises, whether he would be authorized in view of that fact to continue his payments from time to time in accordance with the terms of the contract, having taken open and notorious possession of the premises, so that the world is bound to know that he owned it or had at least a claim to it, so as to put everybody upon inquiry? Or should he, before making each and every payment, small as they were, be required to go to the recorder's office to examine and ascertain whether a mortgage had been put upon the premises? Had he not a right to presume that he would be fairly dealt by? He had bought the premises, held the equitable estate and had the right to make payments. If that were all there was in the case it would still be doubtful; but in addition to that follows this other question which we hold is established in the case, and that is, that Ranney, before taking his mortgage, had actual notice of this possession by McKennon. Now, what was his duty in the premises? Ought he, with that fact before him, to be permitted to take a mortgage from some one else than the one in possession of the premises, simply because he had the legal title, place that mortgage upon record, and then, without any notice whatever by him to the contractee in possession, claim that that party should be held responsible for the payment a second time of this purchase money, paid by him in good faith without any knowledge of the existence of that mortgage?

Now, in determining the merit of these two equities, and solely upon that ground, we are constrained to hold in favor of the party holding the premises by contract; that as between these parties his equity is superior, and has therefore a prior claim.

Another claim is that Mrs. Yates, who has a mortgage only upon lot 28, although not taken until August, 1873, ought to be permitted to push Ranney over upon some other lots. We find no warrant for this at all, because her mortgage is largely behind all of them. Ranney's mortgage upon lot 28 is prior more than a year in point of date. We therefore hold against that claim. A decree may be taken according to this statement of the decision.

L. H. Ware, for plaintiff.

J. H. Grannis, Foran & Hossack, Bishop & Adams, and Mix, Noble & White, for defendants.



**\*LANDLORD AND TENANT.**

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[Holmes Common Pleas, 1879.]

**JOHN HORN v. BOWEN BROTHERS.**

A mining contract not for a term certain, with stipulations for payment of a yearly amount until mining operations commenced, is not realty as an absolute sale of the minerals, but is a chattel capable of sale as such by the lessee's administrator.

The plaintiff claims under a lease dated in 1872, of 37½ acres of valuable coal land. The defendant by cross-petition avers that a lease was executed to Vaunest & Byers in 1865, through whom defendant claims title. Plaintiff replied that the lease of 1865 contained stipulations for payment of a yearly amount of \$160 until mining operations were commenced—or on failure that the lease becomes void.

During the trial the defendant offered in evidence a record of the probate court showing a sale to defendant of the interest of F. Shattuck in the lease under which defendant claims, sold as personalty, to which plaintiff objected, on the ground that the instrument under which defendant claims is not a chattel, but realty—not being a lease for a term certain, and but absolute sale of the mineral.

Plaintiff cited section 20 S. C., 505, 1 S. C., 1142; 11 O., 355, 357, 8; 13 O., 334 and 362; Bing. on R. Property, 295. The court overruled said objection and admitted said record, holding said instrument to be a chattel, and capable of sale by administrator, to which plaintiff excepted. The court cited 7 O., 119.

Stilwell & Maxwell, for Plaintiff.

**\*ADMINISTRATORS—APPEALS.**

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[Cuyahoga District Court, March Term, 1879.]

**IRAL A. WEBSTER, ADMR., ET AL. v. CHARLES J. BALLARD,  
ET AL.**

A petition by an administrator to sell land of the decedent to pay debts, and to sell land fraudulently conveyed by him, is not an action or a suit, but a statutory proceeding and is therefore not appealable to the district court.

**ROUSE, J.**

This case comes into this court by appeal. The trial has occupied a great length of time. It has been closely contested as to the facts and the law, very ably argued by counsel, numerous authorities referred to, and all the light apparently thrown upon the subject that can be, and the matter is before us now for final decision.

The petition is filed by Iral A. Webster as administrator of the estate of David Morrison, deceased; and Edward H. Van Husen is joined with him in the petition. The petition sets forth in substance that Webster is the administrator of David Morrison, deceased; that the personal estate which has come to his hands as administrator is not sufficient to pay the debts of the deceased, the charges of administration and the allowance for the support of the widow and children for a period of twelve months; and therefore he asks authority from the court of common pleas to make sale of real estate.

Now, when an administrator finds that the personal estate in his hands is not sufficient to pay the debts, charges of administration and the allowance to the widow and children, what is he to do? The whole thing is provided for by statute. Before going into this case to see what has here been done in fact, I propose to refer for a moment to the statute upon the subject to see what is the duty of the administrator in such a case, who should be made parties, what the court is to pass upon when the proper parties are before them, and will then take up the petition and the proceedings and see what in fact has been done.

**138** \*Section 117 of the statute governing executors and administrators provides as follows: "As soon as the administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased, with the allowance to the widow and children, for their support twelve months, and the charges of administering the estate, he shall apply to the court of common pleas for authority to sell the real estate of the deceased."

"In order to obtain such authority, the administrator shall file his petition either in the court of common pleas of the county in which the real estate of the deceased or any part thereof is situated, or in the court which issued his letters of administration."

"The real estate liable to be sold as aforesaid shall include all that the deceased may have conveyed with intent to defraud his creditors, and all other rights and interests in lands, tenements and hereditaments."

As to the parties the statute provides: "The widow, if any, and the heirs or persons having the next estate of inheritance from the deceased, if known to the administrator, shall be made parties defendants to such petition."

The next and subsequent sections provide for service of notice upon the heirs, widow, or the persons having the next estate of inheritance, and so on; and if they are non-residents of the state, or their names or residences unknown to the administrator, service shall be made by publication for four weeks.

These parties, the widow and heirs, or the persons having the next estate of inheritance, if known to the administrator, having been served with notice of the pendency of his application, what is the next thing? "If the court are satisfied that the defendants have been duly notified of the pendency of the petition as above pre-

scribed, and that it is necessary to sell real estate of the deceased to pay his debts, they shall order the real estate, or so much thereof as may be necessary for the payment of the debts, to be sold."

Now, these are the provisions of the statute governing an administrator. First, if he shall find that the personal estate is not sufficient to pay the debts, charges of administration and the allowance for the support of the widow and children, he shall apply to the court of common pleas or to the probate court which issued his letters of administration for authority to sell real estate. The real estate liable to be sold is the real estate of the deceased, including all lands that he has conveyed for the purpose of defrauding his creditors, and also any interest that he may have in real estate. The parties to be made defendants to this petition are the widow, if she is living, and the heirs, or the persons having the next estate of inheritance if they are known to the administrator. And when they are brought before either the probate court or the court of common pleas, what is the question to be passed upon by the court? If the court are satisfied that the defendants have been duly notified as above prescribed, and that it is necessary to sell real estate," then they shall make an order for the sale of real estate. Now that is the subject matter to be passed upon either by the probate court or the court of common pleas, in whichever the administrator elects to file his petition.

"The petition shall, if the court require it, set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, the value of the personal estate and effects, and a description of the real estate, and the value thereof, if appraised." Now, this is only necessary if the court require it; otherwise, all that need be contained in the petition is simply a statement by the administrator that he is administrator of the estate, that the personal effects in his hands that have come to him as administrator are not sufficient to pay the debts of the deceased, the charges of administration and for the support of the widow and children, and ask authority to sell real estate, without setting forth the value of the personal property in his hands, or without any description of the real estate that he desires to sell.

Now, these things being borne in mind, what has been done here? In August, 1874, the plaintiff, Iral A. Webster, filed his petition as an administrator, there being joined with him one of the creditors, Van Husen. He sets forth in that petition that he is the administrator, duly qualified and acting as such; that the personal estate that has come into his hands amounts only to about \$300; that the debts against the estate are very large, amounting to several thousand dollars; that the charges of administration will amount to several hundred dollars; and he asks an order of the court to sell real estate, and points out what real estate he desires to be sold. First, he names a tract of land, embracing some eleven or twelve acres, lying now within the limits of the corporation, and called in the argument Glen Morrison, which he says was conveyed by the

deceased for the purpose of defrauding his creditors. He then names several other pieces of property ; but as only two others have been referred to in the evidence and by counsel, I will speak of them only as contained in the petition. He says, in addition to this, Glen Morrison, which he claims has been fraudulently conveyed by the deceased, that the wife of the deceased (David Morrison being the deceased and Charlotte Morrison his wife) was the owner of a lot on the public square in this city, on which she had given a mortgage ; that there was a large amount due on that mortgage of principal and interest, and that her husband, David Morrison, deceased, paid off this mortgage, at one time paying \$1,805 principal and interest on the mortgage, and prior to that having paid some \$200 or \$250, and cleared off this mortgage for the benefit of his wife. It was claimed in the petition that this gave David Morrison an equitable interest in that property, but it is not so claimed in the argument of the case by the counsel for plaintiff. The substance of the claim is this: A man who was in debt, and whose money should go first to pay his debts (Van Husen's debt existing against him at the time), voluntarily paid off in the sum of about \$2,000 a mortgage belonging to his wife—that he paid money for his wife to the amount of \$2,000, you may call it, and she paid it (it would amount to the same thing) to extinguish the mortgage. Well, suppose that be so. Here is an averment that this deceased, David Morrison, has voluntarily given to his wife the sum of \$2,000, when at the same time there were large debts outstanding against him, to the extinguishment of which this money should have been applied, and it is now practically sought to recover from Charlotte Morrison and her heirs that \$2,000 in *money*. It is money that is sought to be recovered not real estate. The petition can only embrace a request that the court grant authority to sell real estate. This is personal property—*money*. No order of the court is provided by the statute for the recovery of personal property—*money*. None is needed. So far, then, as that is concerned, it is simply a desire of the administrator to recover personal property—money—to the extent of \$2,000. It is not a petition to sell lands or an equitable interest in lands, but so far as that is concerned, a petition to recover personal property—*money*. Then it is improperly embraced in this petition. It should simply be a petition for authority to sell lands or an interest in lands.

The third thing embraced in the petition and relied upon as a cause of action is this: That David Morrison in his life time was the owner of some five or six thousand acres of land in West Virginia ; that within twenty days after Van Husen had recovered his judgment against him in 1857, and the judgment amounted to over \$8,000, he fraudulently conveyed these five or six thousand acres of land lying in West Virginia to John Barr in trust for his wife, Charlotte C. Morrison ; that the conveyance to Barr was made for the purpose of defrauding creditors. The amended petition sets out that John Barr afterwards conveyed this estate to Charlotte C. Mor-

rison, the wife of the deceased, and that she is deceased, that his property descended to her heirs, that her heirs have since sold this property lying in West Virginia and turned it into money and have now in their possession the proceeds of this sale to the extent of \$6,400, and the petitioner desires to subject that to the payment of the debts of the deceased. Now, what is the outcome of the claim as to this third matter in the petition, this \$6,400 in money now in the possession, as is alleged, of the heirs of Charlotte C. Morrison—the proceeds of the sale of this six thousand acres so claimed to have been fraudulently conveyed? These heirs are residents here and have the money now in their hands. The administrator seeks to compel them to account for this money. Now, this again is personal property—money. No order of the probate court or court of common pleas is necessary to enable the administrator to go ahead and recover money of these parties directly. It is not a petition to sell real estate. It is not a petition to sell an interest in real estate, but a petition to compel these heirs of Charlotte Morrison to account for money in the sum of \$6,400, the proceeds of the sale of the lands so fraudulently conveyed to John Barr. Now, that being so, that is out of the case. That is personal property. There is no claim of any authority to set aside that sale of lands in West Virginia. The plaintiff is simply calling upon these heirs to account for money in their hands. That is the shape in which it is treated by the parties upon both sides. That is *money*. That is not, then, properly embraced in the petition for an order to sell real estate, for it is not real estate, nor an interest in real estate; it is money. Nothing prevents nor has prevented him from suing these parties directly, and, if he can make out a case, recovering the money in their hands.

So that the proceeds of this West Virginia land which is now in money may be laid aside from this petition. The \$2,000 given by David Morrison to his wife to extinguish the mortgage on her own lot is money. That may be laid aside. Then what is left in the petition? It is simply a petition for an order to sell lands, and the single parcel of land for which authority is sought to sell, is the twelve acres lying on the other side of the river (Glen Morrison). We will, therefore, confine our attention to that. By whom is this petition to sell real estate filed? By the administrator. What does he set forth in his petition? That there are not personal assets sufficient to pay the debts of the deceased, the charges of administration and a year's support to the widow and children; and asks for authority to sell real estate. What is the question before the court on that petition? If the court are satisfied that the defendants have been duly notified of the pendency of the petition and that it is necessary to sell real estate of the deceased to pay his debts, they shall order the real estate, or so much thereof as is necessary, to be sold. Now, what question was properly and is properly before the court under this petition? It is this, and nothing else, so far as the administrator is concerned: Is it necessary to sell real estate of the

deceased to pay his debts? Now who are the parties defendant to that petition provided by statute, and who alone? The heirs of David Morrison (his widow being dead). Who are they? His twelve children. Have they all been made parties? They have. They are all in court, and were in the court below. Now, what single subject-matter was there before the court below on the petition? It was this: Is it necessary to sell the real estate of the deceased to pay his debts? The administrator could tell his story. The heirs could tell their story. They might say that the administrator had the personal property in his hands with which to pay the debts; they were the parties owning the real estate, and there was no necessity to come to the real estate, and all that. That was the only subject to be passed upon by the court—Is it necessary to sell the real estate of the deceased, or is there personal property enough?—that is all there was of it. Now, by this proceeding, who are the defendants? Simply the heirs of David Morrison, deceased—nobody else. No provision for bringing in the fraudulent grantee. No provision even for setting out a description of the land, unless the court shall require it. No provision for bringing in the fraudulent grantee; no day given him there in that court in any shape or form.

But it being claimed that this was property fraudulently conveyed by the deceased for the purpose of defrauding his creditors, there is this other provision. If the court shall order real estate to be sold to pay the debts of the deceased, then section 120 provides as follows: "If the administrator shall be ordered to sell any lands so fraudulently conveyed by the deceased, he may, before sale, obtain possession by an action of ejectment, counting as upon his own seizin; or may file a bill in chancery, to avoid the fraudulent conveyance."

Having first on this petition got an order of the court to sell real estate, he may then as the next step either commence an action in ejectment against the fraudulent grantee, or he may file a bill in chancery to set aside the fraudulent conveyance; but until he gets that order he cannot take a step in that respect; nor is the fraudulent grantee in the petition for authority to sell real estate a party before the court in any shape or form, nor has he anything whatever to do with it—no day in court there. The simple question on that petition is, as provided in section 128, where the administrator is the plaintiff and the heirs of the deceased are defendants, is it necessary to sell real estate to pay the debts of the deceased?

Now, if the court grant authority to sell real estate, then, if the claim is that there it real estate that has been fraudulently sold, the administrator may then commence his suit against the fraudulent grantee in ejectment, counting upon the seizin in himself, or he may file his bill in equity to set aside the fraudulent conveyance, and not till then. Such is the law.

Now, who has been properly in court, and who alone? There is no petition to sell an interest in real estate. If there were, there is another provision of the statute that provides who shall be made

parties where the administrator desires to sell an interest in real estate. He shall not only make the heirs, but he shall also make the persons parties holding the legal title, and also other persons parties to whom any payments upon the real estate may become due. Then it \*is necessary to sell an interest in real estate— 140 the court shall order it to be done. It further provides how it shall be done. But there is no claim in this petition of an interest the parties desire to sell. So it is simply a petition to sell lands because the personal property is not sufficient.

Now, who have been properly and legally before the court? The administrator filing the petition on the one side and the heirs of the deceased on the other, and they alone. What has been properly submitted for the court to consider, they being all properly before the court, and nobody else properly before the court? Solely this: Is it necessary to sell the real estate of the deceased to pay his debts? The court having heard the administrator on the one side and heard the heirs on the other, refused to grant such an order, and there the case stands.

From that refusal of the court to grant authority to sell real estate, an appeal is sought to be taken to this court. Can an appeal be taken from the court of common pleas in such a proceeding? This is a special statutory proceeding so far as the administrator is concerned. It is neither a suit at law nor a suit in equity; it is not a civil action; it is a statutory proceeding. The statute provides that the administrator may file his petition for order to sell real estate either in the court of common pleas or in the probate court. The probate court has full jurisdiction. The court of common pleas in that matter has no more extended jurisdiction than the probate court. It was filed by election of the administrator in the court of common pleas. The court of common pleas have refused to give the order, and the plaintiff's appeal is here, or sought to be. The decision in the 15th Ohio State is plain that in case of a special statutory proceeding there is no appeal from an order of the court; that it is neither a suit at law nor a suit in equity, and not a civil action. Then, so far as the administrator is concerned, there is no appeal to this court.

But there is another party, and who is he? Let us read the opening of the petition. "The said Iral Webster, suing as administrator as aforesaid, and the said Edward H. Van Husen, suing as a creditor of said David Morrison in his own behalf and in behalf likewise of all other creditors of said David Morrison who see fit to join in this suit and contribute to the expenses thereof, state to the court as follows: That the said Webster was duly appointed by the probate court within and for Lorain county, administrator of the estate of David Morrison, who died in Oberlin in said county the 1st of May, 1868, and on the 7th day of said May the said Webster duly qualified himself to act as such, and entered upon the performance of his duties as such administrator immediately thereafter; that debts and claims have been presented to him for allowance to the

amount of several thousand dollars, and the year's support to the widow allowed by the court is a thousand dollars, and the costs of administration will be several hundred dollars, and the personal property belonging to said estate will not exceed three hundred dollars."

The question here is whether the joining of a creditor with the administrator takes this whole thing out of the statute and somehow transforms it or transmogrifies it into a suit in equity, in which the administrator is a party as well as Van Husen. It will be borne in mind that the administrator may file his petition either in the probate court or the court of common pleas, as he elects. The one has the same jurisdiction as the other. Suppose this petition had been filed by the administrator in the probate court of Lorain county. What could that court have said? "We have read the petition. We see here the administrator is the party plaintiff. We see that the heirs of the deceased are made parties defendant. So far so good. You ask for the sale of the real estate because there is not sufficient personal property to pay the debts of the deceased. So far so good. But you have got a party here joined with you that we know nothing about. He represents himself as a creditor of the estate. Well, he has filed his claim with you, and you have allowed it, and you file his petition as a representative of the creditors, and to raise money to pay off this other creditor who is now suing with you and all other creditors; he is acting in your behalf, and at the same time he is undertaking to act for himself. Now, you ask in your petition for authority to sell real estate. So far so good. That is just what you can do under the statute. And you with him further ask the court to set aside fraudulent conveyances, and all that, making a sort of bill in chancery." The probate court would say, "So far as that is concerned, we have no authority. We have no jurisdiction to sit as a court of chancery in any shape or form. We can simply sit as the statute provides. You can come in with your petition, and the statute provides that the administrator shall file the petition himself; no provision for the creditors to join with him; and the very creditor who joins and attempts to sue in his own behalf has filed his claim with you and you have allowed it, and you are bringing this suit in his behalf. We cannot recognize him; know nothing about him. You ask for the setting aside of conveyances of real estate as fraudulent. We have no jurisdiction in that matter. All we can do is to hear you upon the single question, Is it necessary to sell real estate? If you show it to us to be so, we will make the order. That is as far as we can go. If you do not, we will refuse it."

Then has Van Husen, a creditor, who filed his claim with the administrator, by whom it has been allowed, and the administrator who has filed this petition for an order to sell real estate to pay off this and all other creditors, a right to join in an attempt to have these conveyances set aside and the real estate sold either for his own benefit or the benefit of all the creditors? The probate court



would have no jurisdiction in such a proceeding and would not do anything with it. The court of common pleas has no further jurisdiction in this matter than might be exercised by the probate court. Our courts, following the decision in the 1st Ohio State, do not favor the inference of a creditor with the estate of the deceased in any shape or form. The administrator, the court say, is the party to whom all assets, real or personal, belong for the payment of the debts of the estate, and that they will not favor the intervention by a creditor except so far as to get the real estate into the hands of the administrator, who alone is to dispose of it. They also say in that decision that if a creditor should file a petition in his own behalf and in any way get a conveyance set aside and recover upon it, he cannot hold a dollar of it; he must pay it all over to the administrator for the general benefit of the estate; and that no vigilance of a creditor will avail him in that regard as to getting his debt paid in preference or in a larger proportionate amount than the other creditors of the deceased.

Cases have been referred to of this kind: Where an administrator has been in collusion with the heirs and has refused to take any proceedings, the court recognizes such conduct as fraudulent, and in a case of that kind a creditor may file a petition to compel him to do his duty, or may do the \*same thing that the administrator ought to do. 141

But in this case the administrator files a petition—is doing his duty in every respect. The debts against the estate are apparently in excess of the personal assets. He has filed his petition in the court of common pleas and asked for leave to sell real estate, making the heirs defendants—done his full duty throughout—and the court have refused his application.

There is no pretense of a reason why a creditor should seek to intervene in this case, separate from the administrator or conjointly with him. The statute provides that the *administrator* shall file his petition—not the administrator and a creditor, or the creditors. The administrator shall be the plaintiff in the suit, and the assets recovered in behalf of the creditors. If, then, a creditor should also commence a suit, there would be this state of things: An administrator set to work by the creditors to recover assets to pay all the debts of the deceased, and a creditor seeking to recover the same thing for himself. That cannot be done. Now, we are clearly of the opinion, so far as Van Husen is concerned, that he has wrongfully interfered in this case—that he is not a proper party, and that so far as the petition refers to him, further than simply to state that he is a creditor with others, it is to be disregarded. That this is simply a statutory proceeding by the administrator in the court of common pleas, and might have been in the probate court, making the heirs of David Morrison parties, and properly nobody else could be made a party. The sole question to be determined is, Is it necessary to sell the real estate of the deceased to pay his debts? That was the only question in the court below to be passed upon, and, as

we have said before, it is sought to appeal from the decision there made. This is a statutory proceeding; not a suit at law; not a suit in equity; and the appeal must be dismissed.

R. F. Paine and Henry McKinney, for plaintiffs,

R. P. Ranney. W. W. Andrews and Arnold Green for defendants.

### \*BILLS AND NOTES—EXCEPTIONS.

[Cuyahoga District Court, March Term 1879.]

JAMES WRIGHT V. R. N. DENHAM, ET AL.

1. Where an indorsement was made at or before the execution of a note, or in pursuance to an agreement to become responsible from such time, such indorser is presumably a co-maker, and can be sued as such, with the privileges of a surety, and parol evidence is admissible to show the nature of his liability.
2. Where exceptions are taken to a general charge given by a court to the jury, unless the party excepting points out specifically the part of the charge excepted to, or the grounds of his exceptions, a reviewing court is not bound to take notice of such exception.

ROUSE, J.

In the court of common pleas the plaintiff filed his petition, setting forth that on a certain day the defendants made and executed their note for the sum of \$2,500, payable to the order of one S. G. Baldwin, indorsed by Baldwin to himself, who was the owner and holder thereof; that the note was past due and no part of the same had been paid, and asked for a judgment thereon. To this petition R. N. Denham made no defense. J. L. Denham, one of the parties charged as a maker of the note, came in and answered. He admitted indorsing his name on the back of the note, but said he did it not as a maker, but as an indorser—that he was an indorser, and an indorser only, upon the note; that when the note became due no demand was made upon him for payment, and no notice given him of nonpayment; in other words, that the note was not protested for nonpayment, and that thereby he was discharged so far as the note was concerned.

The issue then made by the pleadings is this: J. L. Denham was charged in the petition as a maker of the note; the answer set up a denial that he was a maker and alleged that he was an indorser and an indorser only, and was discharged from payment because no protest had been made of the note; and that is the only issue in the case, and on that issue a trial was had before a jury, who brought in a verdict in favor of the plaintiff, on which verdict judgment was rendered by the court.

The errors assigned in the bill of exceptions are: 1. Error in the charge of the court. 2. Error in refusal of the court to give charges requested by the defendant. "To which refusal to charge

as requested by said defendant, and to which charge as given by said court to said jury, the said defendant excepts." In the first place he excepts to the charge of the court as a whole. Looking at the bill of exceptions we find the charge was in writing; that it covers some 6½ pages of legal cap; that it consists of numerous propositions. Now, it is well settled by decisions of the supreme court in the 25th O. S., 30 and 32 O. S., that where the charge consists of several propositions, if the defendant desires to except, he must, at the time the charge is delivered, specify what propositions of the charge he excepts to, giving the court a chance to hear his reasons, and if the court, in their better judgment, find they have erred as to those propositions in the charge already given, they may correct them upon the spot. But where no propositions are specifically pointed out as excepted to, and the exception is general to the charge as a whole, the supreme court have decided that the district court or the superior court need not review that on error. That is the case here. The charge is lengthy, consisting of numerous propositions. The exception is simply to the charge as a whole. We therefore lay that charge and the exceptions here wholly aside for that reason.

The next exception is to the refusal to charge as requested. We find that ten requests were handed up to the court by the defendant and requested to be given in charge to the jury. Of these ten requests the first five were given and the last five were refused to be given by the court. It is not then true as a matter of fact that the court refused to charge as requested by the defendant. The court charged in part as requested, and refused to charge in part as requested by defendant. It gave five of the requests to the jury and refused to give five.

But suppose this refers simply to what the court did refuse to give in charge—the last five requests. The exception is to the refusal of the court to give the whole of those five requests to the jury. Now, it is well settled by a decision of the supreme court that unless the party specifies the particular requests which he excepts to as having been refused by the court, but excepts simply to the refusal of the court to give the whole, if any one of the requests is unsound, the court is correct in refusing to give the whole, because the request is to give the entire request.

Now, were the whole five requests sound law? The first of the five requests is as follows: "If J. L. Denham did not sign said note as indorser but as maker, then in that case, his name being upon the back of the note, \*the presumption is that he was surety and not principal upon said note." 147

Now, what was the issue in this case? The issue was, is this defendant a maker or an indorser? Now, what is requested to be given in charge? In substance, that if the jury find the answer of the defendant is not true—that he was not an indorser but a maker as charged by the plaintiff—then the presumption in his name being upon the back of the note, that he signed as surety and not

as principal. Now, no such issue was made by the pleadings. The request is that if he is found to be a maker, the presumption is that he is surety and not principal. That would simply have misled the jury. It was not a charge material to the issue. The court properly refused to give it.

Now, that is one of the five requests that the court refused to give. We will say that all of the other four were sound law. The request is to give the whole five. One was not proper to be given. The exception is to the refusal of the court to give the whole five. That point is equally well settled by the decisions of our supreme court—that where several requests are asked to be given to the jury, one of which is unsound, and the exception is to the refusal of the court to give the whole, it is not error on the part of the court to refuse to give the whole. That we find to be the case here.

We find then that there was no error on the part of the court in refusing to give the whole five of these charges, and that the exception is not well taken.

Judgment of the common pleas affirmed.

Jackson & Stewart and Herricks, for plaintiff in error; Frank Kelley and R. F. Paine, for defendants.

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### VENDOR AND PURCHASER.

[Cuyahoga District Court, March Term, 1879.]

†WICK V. GREEN.

Where a purchaser of property retains part of the purchase money to provide against a supposed lien on the property, without having in any way agreed to pay it, gives the incumbrance no claim against such purchaser to pay it.

HALE, J.

The defendant in error, who was the plaintiff below, brought her action in the court of common pleas against Henry Wick, the plaintiff in error, to recover a specified sum which she alleged Wick had assumed and agreed to pay to her as a part of the consideration or purchase price of certain premises purchased by Wick of one Wallace. This alleged agreement was not contained in the conveyance itself, and on the trial in the court below it was sought to be established by parol. It was claimed in argument that Wick could only be liable by virtue of an express promise made at the time of the conveyance, and that any parol promise by him to pay the debt would be within the statute of frauds and therefore void. This claim, we think, will bear investigation, and to decide it with any degree of confidence that we are right would require more time for investigation than we have been permitted to devote to it.

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†See 1 Cleveland 250, for common pleas decision. (Page 301 this vol.)

But we have looked through the whole case, and we are unable to see how we can sustain this verdict under the charge of the court, having investigated very fully, in another case, the principles of law upon which the liability in a case of this kind is founded.

Now the court, after making a statement of the conveyance and of the claims of the respective parties, says, "You have a right in considering this question"—that is as to the liability of Wick—"to look at all the facts and circumstances as related by the witnesses. You need not stop to inquire who offers the testimony. It is your duty to judge of the facts, and I will say to you in brief that if you come to the conclusion—if the weight of the testimony supports the conclusion that at the time of the conveyance of the real estate by F. T. Wallace to Henry Wick for the consideration of \$33,000, any portion of the \$33,000 was retained—withheld by Wick from Wallace, to secure or to provide against any supposed lien that this plaintiff may have had at the time of this conveyance, and it was talked of, understood, and assented to by Wallace that the money thus retained by Wick was retained to secure him against any supposed lien or any lien in fact in favor of this plaintiff—if the testimony satisfies you of that state of facts, the plaintiff is entitled to your verdict. This excludes the idea of his implied promise or agreement to pay," thus leaving it simply upon the naked fact of the making of the conveyance and retaining of the money by Wick as indemnity against the lien that Mrs. Green was supposed to have. We have read this charge through twice from beginning to end for the purpose of seeing whether, taking it altogether, it could be sustained, under this charge if Wick kept back in that arrangement or his own protection a certain amount of that \$33,000; that Mrs. Green, without any reference to an implied or express promise, might recover. We feel compelled to say that is not the law, that the natural result of that charge would be to prejudice the jury, and give them a wrong basis upon which to found a verdict. We think upon this charge, without passing upon all the questions that have been argued by counsel, that the case must be reversed and they may take their chances on the main question that was argued, which, to say the least, must be considered a doubtful one.

S. Burke, for plaintiff in error; E. J. Estep, for defendant in error.

**\*PLEADINGS.**

[Cuyahoga District Court, March Term, 1879.]

**BRAINARD V. RITTBERGER.**

1. It is proper, and the better practice, in pleading on several causes of action, to add at the end of all a general prayer of judgment on all, instead of appending a prayer to each cause of action.
2. It is poor pleading for plaintiff in an action to enforce the collection of certain notes and to foreclose a mortgage securing the same, to aver that there is due and owing him from defendant a certain amount of money on said notes, as such an allegation amounts to a mere legal conclusion.

HALE, J.

The defendant in error filed a petition in the court of common pleas to enforce the collection of four promissory notes and foreclose a mortgage given to secure the same. The petition contained five causes of action, four of which were founded upon the notes and the fifth upon the mortgage. The first four causes of action describe the notes, but neither contains a prayer for judgment. To these a demurrer was interposed on the ground that they do not state facts enough to constitute causes of action. The demurrer was overruled by the court below, and that ruling, it is alleged, was erroneous. It is claimed that there should have been a prayer for judgment at the close of each cause of action. At the close of the cause of action on the mortgage there is a prayer for judgment specifying the exact amount due upon each note and also a prayer for a decree for a sale of the premises. The question presented is whether in a petition setting up several causes of action there should be a prayer for judgment added to each cause of action, or whether the causes of action are demurrable for the absence of such prayers. Precisely what the practice has been I am not aware. Every fact is stated in each of those causes of action essential to a recovery. Then after stating all the causes of action the relief is demanded. If that practice is allowable under the code I think it is the better practice, and I see no reason why it is not allowable. Several causes of action may be joined in the same petition. We are not disposed to disturb the judgment on that ground.

The fifth cause of action presents a question of more difficulty. The other causes of action are upon the notes, and a copy of the notes is attached to the petition. The causes of action allege the giving of the notes and the amounts due upon the notes. The fifth cause of action starts off in this way: "The plaintiff further says that his fifth cause of action against G. H. and A. W. Brainard"—then there is this language—"for the purpose of securing the payment of said above mentioned and described notes said G. H. Brainard"—Then further on: "The plaintiff further says that said above mentioned and described notes and said mortgage

securing the same were given by said G. H. and A. W. Brainard as aforesaid for the balance of the purchase money due the plaintiff for said described real estate." I only read enough of this exception to show the point made. The first objection to this cause of action is that the notes referred to in it are not fully described; that the words "above mentioned and described notes" is not sufficient. The claim is made that if the pleader had said, "the notes above described and the allegations relating thereto are hereby adopted and made a part of this," it certainly would have been sufficient.

We are not disposed to disturb the judgment upon that ground. A copy of these notes is attached to the petition. They are fully described. It is impossible to treat these as separate papers. The copies are attached and referred to as "the above mentioned and described notes." We are inclined as against this demurrer to hold this petition good.

There is another serious question: Having set out the mortgage and the record of the mortgage, etc., the breach is alleged in this way:—not saying that the condition of the mortgage has become broken and the \*amount unpaid—"the plaintiff says that there is now due and owing him from said defendants G. H. Brainard and A. W. Brainard on the first of said notes," and so on with the other notes—alleging as it is said, a legal conclusion. It is said that that amounts to nothing and must be treated as nothing against this demurrer. We are disposed, on the whole, as against a demurrer, to hold this cause of action also good, but we would advise the attorneys not to repeat the experiment—if they have another petition to draw, to draw it in a different shape.

We will affirm the judgment.

Tyler & Denison, for plaintiff in error; Stone & Hessenmueller, for defendants in error.

### HUSBAND AND WIFE.

[Cuyahoga District Court, March Term, 1879.]

†N. C. BREWER V. MARTIN MAURER.

Where a married woman buys certain real estate, assuming a certain mortgage as part of the purchase money, she becomes liable for the debt, and therefore her grantees purchasing such premises and assuming the mortgage, are bound to pay it.

HALE, J.

This action in the court below was brought by Martin Maurer against the defendants Brewer and Truscott. The petition alleges this state of facts: That on the 27th of January, 1872, one George Braundel was the owner of certain premises in this city. On the

† Reversed 38 O. S. 543; see 1 Cleveland 348, for common pleas decisions.

3d of May, 1875, Braundel conveyed the premises to Mary Braundel, the wife of a brother. But before the conveyance to Mary Braundel, George Braundel had executed a mortgage upon the premises to secure the payment of some \$16,000, and at the time of the conveyance to Mary Braundel, there was a balance due upon that mortgage. In the conveyance to her, there occurs this clause, "that the said grantee assumes a certain mortgage given by grantor to Martin Maurer January 27, 1872, and interest thereon as a part of the purchase money."

On the 18th of October, 1875, Mary Braundel, her husband, John Braundel, joining with her, conveyed these premises to L. B. French, and in that conveyance there is contained this clause: "The above is made subject to a certain mortgage for \$1,500, made by George Braundel to M. Maurer, and which the said grantee hereby assumes and covenants to pay." On the 24th day of December, 1875, French conveyed to these defendants, Brewer and Truscott, and that conveyance contained the same conveyance on the part of Brewer and Truscott that is contained in the deed of Mrs. Braundel to French. The mortgaged premises were sold and failed to pay the mortgage, as I understand it from this petition, and this action is brought against Brewer and Truscott, the last grantees, to recover the balance due on the notes secured by that mortgage, not paid by the sale of the premises. The question is whether the action in this shape can be maintained. Brewer and Truscott file two or three separate answers; but they rely upon their first answer. That answer raises this question, and it is said by the counsel for the plaintiff in error that the judgment may be affirmed or reversed as we find upon that question. The premises were conveyed by George Braundel to Mary Braundel, a married woman, with an agreement on her part to assume to pay this mortgage. She passed it along to French, and French to these defendants. It is admitted that if George Braundel had conveyed directly to the defendants Brewer and Truscott with the agreement that Brewer and Truscott should pay the mortgage, that agreement could be enforced in the present shape; but it is said the agreement between George Braundel and Mary Braundel, she being a married woman at the time of the conveyance, imposed no liability either in law or equity upon her, and she, therefore, not being liable, her grantee is not liable. Now, the decisions in New York, in the 10th of Paige, recognize the doctrine that an agreement on the part of a debtor with a third person to pay his debts, may be enforced by the creditor. They lay down that proposition, and they say where the contracting party is not personally liable for a debt, he cannot contract with a third party and make a valid contract with that third party to pay his debt. That case was reviewed in several New York cases, and lastly in the 69th of N. Y., all the case adhering to the doctrine that as a pre-requisite to the fixing of the liability of the grantee to pay the debt of the grantor, the grantor must have been liable, to pay the debt.



These cases, so far as we have been able to examine them, do not meet precisely the question in this case as to the non-liability growing out of incapacity, as in the case of a married woman. But while in New York they hold to this doctrine clearly, as first considered in the 10th of Paige, down to the 69th New York Reports, in a very recent case decided in that state, it was sought to extend this doctrine so as to hold that because the grantee was a married woman, and, therefore, by reason of her disability not liable for the debt, that her grantee was not liable to her creditors. But under the legislation of that state, a married woman, in accepting a conveyance of real estate with an agreement upon her part to pay the incumbrance or debt of the grantor, would be liable, and hence her grantee would be liable upon similar contracts.

I concede that the statute of New York is somewhat broader than our own, but the principle upon which they put that claim is simply this: that under the statute of New York, she is authorized to purchase and hold as a separate property real estate, and as an incident of her power to purchase, she may contract a debt for the same.

Now, so far as I am aware, our supreme court have not decided this precise question that I am now discussing—the exact liability that a married woman incurs by the purchase of real estate, which, when the conveyance is made, becomes her separate real property under her sole contract.

Our statute provides in relation to married women, by its second section, that "any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest or inheritance, or by purchase, with her separate money or means, or be due as the wages of her separate labor, etc., shall remain her separate property and under her sole control."

By the first section as amended, "any estate or interest, real or equitable, in any property belonging to any woman at her marriage or which may have come to her during coverture, by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property and under her control."

Now in this recent case in New York the same position was taken. It was insisted in that case that she could not bind herself by a contract for the purchase of land, if she has no antecedent estate to be benefited, or if the purchase is not made for the purposes of trade and business. Now, the court in commenting upon their statute say, that the intention of the legislature was to confer upon married women a general capacity to enter into an executory contract to pay for property purchased by her; that that \*is indicated by the 7th and 8th sections of the act of 1860, as 156 amended by the act of 1862, by inserting the word purchase in the first clause of the section.

In our statute there is an absolute authority to purchase with

her separate means, and under our code, in all cases relating to her separate property, she may sue and be sued and bring an action in her own name. Now, what is the inference that they draw from these amendments? That the legislature had in view the acquisition by a married woman of the title to property by purchase; and by implication from the provisions exempting the husband from such liabilities for the wife's contracts and bargains in respect to property purchased by her, she may bind herself by a contract to pay the consideration price of land conveyed to her.

Now while we tread upon new ground here, with very many doubts, we are disposed to hold that under the legislation of our state as it now exists, it cannot be said that a married woman who purchases land and causes it to be conveyed to her, which becomes her sole, separate property, incurs no liability by such purchase, and in so holding, we dispose of the case, and we are disposed to hold that she incurs such a liability in the purchase of land, that in the assuming of the mortgage, or by agreeing to pay his creditor, she assumed a liability. She could assume a liability directly to her grantor for the purchase price of the land thus conveyed to her. That being so, a contract could be made by her with her grantee whereby her grantee should become liable to pay the debt that she was bound to pay. This is the only question in the case and the same ruling was made below. We are disposed to hold that this contract was a valid contract upon which the holder of this mortgage has a right of action against the party who assumed and agreed to pay the mortgage.

The judgment below will be affirmed.

E. Sowers, for plaintiff in error. C. F. Morgan, for defendant in error.

Note—The decision in the above case, made in the court of common pleas, will be found on page 348 in volume I of the Law Reporter.

[Cuyahoga District Court, March Term, 1879.]

M. E. BECKWITH & SONS V. W. R. REID.

Where plaintiff, being the owner of goods, furnishes a person with samples and price lists, who is sent out to sell, and is afterwards furnished with goods to fill his orders obtained from defendant. *Held*, that the defendant may assume that the agent was authorized to collect, and such defendant is not liable if the agent absconds with the money so collected.

TIBBALS, J.

The plaintiff in the suit below filed a petition on an account for goods sold and delivered by him to the defendant consisting of certain frames and material of that character described in the petition. The defendant's answer setting up the defense *nil debet* and

the case was submitted to the court by consent of the parties and a judgment rendered in favor of the plaintiff for the sum of \$6.64. It would seem thus that this litigation is not carried on because a loss of the amount involved would be oppressive to or distress either of these parties, but, I suppose, to settle an important principle. The case certainly must be classed among the exceptional cases—a very peculiar case indeed. It has been very thoroughly presented on both sides, and while I cannot say that in the conclusion we have reached we are entirely free from doubt, yet we are reasonably satisfied of its correctness. We concur in it entirely, having submitted the matter to our associate (Judge Watson) who is not now present with us. It is one of those cases where both plaintiff and defendant have been wronged by the intervention of a swindler, and one or the other, being innocent parties, must bear this burden. The question is, which of the parties shall stand the loss?

The case is substantially this: It appears that a blind boy by the name of Wicks—I will not undertake to recite all the evidence, but sufficient of it so that the case may be understood—applied to Reid for an agency to sell his goods, picture frames, etc., on commission. Reid refused to permit him to have the agency to sell goods for him on commission, but said to him that he would fill any orders he might obtain from other parties; that he would not pay him anything for his services; that he must get his pay from the parties of whom he obtained his orders. The boy assented to that arrangement with Reid. With that understanding Reid delivered to him his price list and samples of goods, and thus the boy went into business. He applied to Beckwith & Sons to make a sale of goods by sample; Beckwith & Sons informed him they were not dealing with Reid, that they were dealing with another firm, and inquired of him why he did not sell for that firm. Wick replied that he could not get compensation of them; that he could from Reid, and for that reason he was selling Reid's goods. Beckwith & Sons said to him that they did not desire any account with Reid; that he had applied to them before for that purpose; but they would buy goods from him (Wick) and pay him for them upon delivery, and that he must get his compensation out of Reid. To that proposition Wick assented. Thus we see the position of both these parties—both of them perfectly innocent except that each knew that Wick was dealing with the other. Reid knew, or it was reported to him, as subsequent events show, that he was dealing and selling goods to Beckwith & Sons, and Beckwith & Sons knew that they were purchasing goods of him that he had got of Reid. First, Beckwith & Sons, upon one of their cards, made out an order for a bill of goods, amounting to some \$14, not signing their names to it, and not addressing it at all to Reid,—merely upon the back of their card making a list of goods that they desired. Wick took the order to Reid. Reid filled it, with the exception of one or two articles that he did not have in stock, so informing Wick, and

Wick informing Beckwith & Sons, of that fact, and asking if a delay of a day or two would be objectionable, and was informed that it was not, and subsequently Reid himself made the same inquiry of Beckwith & Sons and received the same answer. Shortly after all the goods were received and the bill was brought around by the clerk of Reid to Beckwith & Sons, who paid the clerk, and afterwards told Wick that Reid had sent around the bill and they had paid it to the clerk. Wick informed them that that was all right and that he would get his commission \*from Reid. Thus we

163 have the parties dealing with full knowledge of each other through Wick, but in total ignorance as to the true relations that Wick sustained to each party. The transaction ended. Shortly after Wick came again to Beckwith & Sons to solicit the purchase of another bill of goods, and they made out in like manner upon a card, a list of the items they desired, having Reid's price list, which was complete, and they knew precisely the price to be paid. They gave the list to Wick and Wick took it to Reid, and Reid filled the order and delivered to Wick the goods. Wick delivered the goods to Beckwith & Sons and they paid him in full for them. Shortly after Reid sent around his bill demanding payment, and was for the first time informed that Wick had been paid, and thereupon he brought this suit, and the question arises as to which of these parties shall suffer in consequence of the dishonesty of this boy. That, of course, necessitates the determination of the question as to who was the party in fault—who was instrumental in bringing about this fraud? Was it Reid, in the relation that he sustained to Wick in thus sending him out upon the community, or did he act in good faith and have reason to believe that Beckwith & Sons understood that they were dealing with him simply, and that they had no right to pay Wick? There cannot be any doubt about the proposition that if the possession of goods is wrongfully or fraudulently obtained—tortiously obtained by one party, that no title vests in that party to the goods and he cannot convey title to any one else. On the other hand, the exception to that is where one party has held out a person as his agent, and has entrusted him with the possession of his goods, clothing him with the apparent authority to sell and receive the pay. Then the party paying would be authorized to pay the person thus held out to be the agent.

Now, this case rests upon one or the other of these two propositions. They are well settled. We have been cited to a case in the 72d Penn., *Barker v. Dinsmore*, which it is claimed is decisive of this case. One branch of the syllabus in that case is this: "The owner cannot be divested of his property without his consent unless he has placed it in the custody of another and given him an apparent right to dispose of it."

Now it is upon that proposition that this case turns and is to be disposed of. That case in Pennsylvania is quite similar in its swindling character to the present case, but was very much more dis-

astrous in its consequences, as it involved something over \$3,000. The case was briefly this: It seems that a man by the name of John Dinsmore was the owner of nearly 8,000 pounds of wool, and that a man came to him claiming to be a cousin of one William Barker, who was the senior member of the firm of William Barker Jr. & Co., who were wool merchants doing business at Pittsburgh. He represented himself in that capacity and asked Dinsmore if he had any wool to sell, and was informed that he had. Barker then informed him that he was a cousin of the Barker referred to, and that he would again come in on Monday and examine the wool, and then left him—going to Barker & Co. with another and different representation which will appear shortly. But he obtained from Barker & Co. their wool sacks and directed them to be shipped to him at the point where John Dinsmore lived but under the name of Martin Dinsmore—changing the first name, and, of course, in that way he obtained possession of the sacks and bought the wool. The arrangement between him and John Dinsmore was that the wool should be shipped on the cars in the name of John Dinsmore, the real owner of the wool, and consigned to the firm of Wm. Barker Jr. & Co., Pittsburgh, or their order. That is a material thing to take into account in this connection. The shipment was made in his name to the real firm, so that had it gone there, the real firm would have known with whom they were dealing; but instead of the wool reaching the real firm, this man went to the depot, and by some arrangement, succeeded in getting the wool into his possession from the railroad officials and directed them to deliver it to the firm, so that he appeared to the firm as he had originally, as to them, the seller, and drew the money for the wool and left. Now Barker Jr. & Co. claim that he came there to them and represented himself as Dinsmore, residing where the real Dinsmore did, and as having that quantity of wool to sell, showed them samples, and they agreed upon the price in case it corresponded with the samples. It was to be delivered to them at a certain time; he represented himself as the owner of the wool, so that he sustained two relations, both in name and in character to these parties. Then the question came up of course, which of these parties should suffer.

Now, to show the materiality of some of these propositions necessary to be considered, I desire to read briefly a portion of the charge of the court below. I see that the judgment in that case was affirmed, and Barker & Co. were held liable to the plaintiff for the value of the wool. The court charged the jury among other things: "The plaintiff, as we have said, took the bill of lading in his own name as the consignor with the name of the defendant's firm as consignee. Thus far, at least, it would seem the title to this wool, as well as the right of possession, remained in the plaintiff, and he might at any time have stopped it *in transitu* before it reached this city; and down to the time it was delivered to the defendants there is no evidence going to show that the plaintiff ever

delivered this wool to this pretended partner, or in any way placed it under his control. That party had nothing to do with the shipping the wool, nor had he any right whatever to touch it it he was not a memembr or agent of the firm of Wm. Barker Jr. & Co., and it is clear from the testimony of the defendants that he was neither. Whatever control, therefore, he undertook to exercise over it in his own individual interest, was done without the slightest authority from the plaintiff."

Now, Justice Williams, in commenting upon the facts in the case, in reviewing the case, says: "Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad company to be carried to Pittsburgh and there delivered to the defendants to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignee, and their delivering it to the defendants vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined is this: The selling of goods by one who has tortiously obtained their possession, without the consent of the owner, vests in the purchaser no title to them as against the owner \* \* \* nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear then that he could convey no title by this sale, that being so, the defendants acquired no title by their purchase, though they purchased it for a fair and valuable consideration in the usual course of trade, without notice of the ownership or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any \*aspect of it.

164 One of two innocent parties must suffer by the fraud and knavery of a swindler who had no authority to act for either."

That is unlike this case, for Wick had authority to act in the premises, as we shall shortly see. "But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another, or given him an apparent or implied right to dispose of it."

Now in the light of that principle, which it is said is well settled, let us look at this case. Reid, in the first instance, placed samples in the hands of this boy Wick, and placed his price list in his hands. He had knowledge that he was about to sell goods to Beckwith & Sons. He thus armed him with an apparent authority to represent that he was selling his goods, and at prices he had fixed for him to make the sales, but, it is true, without any authority to receive the money. That is the only limitation. The other authority was complete. He might go to Beckwith & Sons and procure from them orders to any amount, the only limitation was—"I will not pay you." He goes to Beckwith & Sons and sells them a bill of goods; that sale is recognized by Reid, for he sends around his bill to Beckwith & Sons; they pay his clerk. It is claimed on the part of Reid, that was a notice to Beckwith & Sons

not to pay Wick but to deal with them—that the goods were theirs. On the other hand, is it not evidence to Beckwith & Sons that Reid recognized Wick as his agent to sell and deliver his goods? The mere fact that payment was made to another clerk would not, it seems to us, militate against the right of Beckwith & Sons to believe that this young Wick represented Reid and had authority to sell and deliver his goods. He thus situated makes another sale of goods, and delivers those goods to Beckwith & Sons and they pay him.

Now, what were Beckwith & Sons bound to infer? Unlike this case in Pennsylvania, young Wick did not tortiously get possession of the goods, and as between Reid and Beckwith & Sons, Reid put Wick in possession of the goods intentionally, and purposely, with the knowledge that he was going to deliver them to Beckwith & Sons. Now, did he not thus give him an apparent authority in the delivery of those goods to Beckwith & Sons to receive the pay? Did he not hold him out as his agent? Reid knew that Wick was rightfully in possession of those goods with authority to deliver them. The only limitation upon this authority of Wick was simply as to his receiving the pay. This case is so different from the Pennsylvania case that, it seems to us, it is not in point. Indeed, the very elements that were wanting in that case, by reason of which they held the purchaser of the wool liable, are elements in this case. There the wool was substantially stolen—was obtained by a sheer trick, with no intention on the part of the plaintiff to give him possession of one pound of wool. This property was actually and intentionally put into the possession of young Wick. In the other case the swindler had no authority to deliver the wool to Barker & Co. In this case Wick had complete authority to deliver the property to Beckwith & Sons, and the simple question is, having that authority, were not Beckwith & Sons fully authorized to infer that accompanying the right to deliver possession was the right of receiving the pay for it?

Now we reach the conclusion that that was a necessary inference on their part; that they were justified in paying this boy, and when we inquire as to who was the instrumentality of enabling this boy to perpetrate the fraud, we find that without Reid's action no fraud would have been perpetrated. It seems to us that he is the party that held this boy out as his agent to sell his goods and the community might treat him as Reid's agent, and a payment to him on a purchase of goods of him, would be a payment to Reid.

We therefore think that the court below erred in its decision, and we will reverse the judgment and remand the case.

Estep & Squire, for plaintiff in error; Mix, Noble & White, for defendants in error.

**NEW TRIAL—MISCONDUCT OF JURY.**

[Wayne Common Pleas, 1879.]

**JAMES W. CHRISTY V. QUINCY A. KEEFER ET AL.**

A new trial will be granted, where the facts show that some of the jury, before the case was submitted to them, experimented on imitating the signature of the note sued on, the defense being forgery.

The action was brought upon a promissory note for \$1,000, made to the plaintiff by Quincy A. Keefer as principal and J. H. Kessler and Joseph Bricker sureties. The defense was forgery. Evidence was given on the part of the plaintiff tending to show that Kessler had signed a number of notes for Keefer. On behalf of the defendant evidence was given tending to show that Keefer had forged various notes for various amounts, and fled the country, and the other defendants denied having signed the notes. Verdict for the plaintiff for the full amount of the note. A motion was made for a new trial on the ground that the jury were guilty of misconduct in that during the trial before the evidence was completed, a number of them experimented upon imitating the signatures.

The Court, Voorhees, J., granted the motion.

John McSweeney, Sr., and C. C. Parsons, Jr., for plaintiff; E. S. Dowell and J. R. Woodsworth for defendant.

**\* LIFE INSURANCE.**

[Cuyahoga District Court, March Term, 1879.]

**†THE CONTINENTAL LIFE INS. CO. V. JOSEPH M. ROBINSON.**

Where an insurance company refuses to recognize a life policy as in force, because of the failure of the insured to comply with the provisions of the policy: *Held*, That the insured has two remedies: First to elect to consider the policy at an end and sue for an equitable value thereof; and second to bring a suit to have the policy adjudged to be in force.

**TIBBALS, J.**

The plaintiff below brought his action against the Continental life insurance company to recover a certain amount claimed to be due to him by reason of a policy of life insurance. The petition avers that on the 7th day of March, 1871, the plaintiff in error issued a certain policy of insurance upon his life for the sum of one thousand dollars for the period or term of twenty years, and among other things that the policy contained the following provision, that if after the receipt by this company of two or more an-

†This case was reversed by the supreme court. See opinion 40 O. S. 271.



nual premiums upon this policy default shall be made in the payment of any subsequent premiums when due, then, notwithstanding such default this company will convert this policy into a paid up policy for as many twentieth parts of the sum thereof insured as there shall have been complete annual premiums paid, when such default shall be made; provided that this policy shall be transmitted to and be received by this company and application made for such conversion within one year after such default; and further avers that the plaintiff had made four annual payments, after the making of which, on the 6th of April, 1875, he returned his policy, having made up his mind not to make any more payments, and requested that the company comply with this provision of the policy, and issue to him a paid up policy for the amount, which would be two hundred dollars, by the terms of the policy payable on the 7th of March, 1894, except in case of his death prior to that time; he avers that he has kept the provisions of the policy on his part, and that the insurance company neglected and refused to issue to him the policy, and he, therefore, asks a judgment against the company for two hundred dollars and interest thereon.

The insurance company, by way of answer, denies that the plaintiff has complied with the provisions of the policy by him to be performed, and says that while the plaintiff has paid the four annual premiums a portion of it was paid in money and a portion of it by note, and by the terms of it he was to pay the interest on those premium notes in advance; that he has failed to make the payment of the installment of interest due March 7, 1875, which he should be required to pay before he would have a right to demand a policy, and they therefore deny that they are required by the terms of the policy to issue to him any policy at all.

The case was tried to the court by consent of the parties. The bill of exceptions sets out all of the evidence. The court found that the plaintiff was entitled to a judgment for the \$200 and interest, and rendered a judgment accordingly. The insurance company seeks to reverse that judgment on the ground,

1. That the judgment is not sustained by sufficient evidence — is against the weight of evidence.

2. Is contrary to law.

3. Error in overruling motion, etc.

This brings up the question of the rights of the parties under this provision of the policy. There is not a doubt but what the plaintiff, if he had complied with his part of the contract, was entitled, at the hands of the insurance company, to a paid up policy for \$200, which would be payable on the 7th of March, 1894, or sooner in case of his death.

Two propositions are submitted: First, whether the evidence sustains the judgment. Now by what law is this plaintiff entitled to a present judgment for two hundred dollars and interest, when by the terms of his contract all he is entitled to is that the company issue to him a policy payable in 1894? The supreme

court of Connecticut, in a case somewhat similar to this (Albany Law Journal of March 8, 1879,) recently decided:

"Where an insurance company refused to receive premiums and to recognize a life policy as in force, *semble*, that the insured has two remedies: (1) to elect to consider the policy at an end and sue for an equitable value thereof; (2) to bring a suit to have the policy adjudged to be in force; and, perhaps, a third remedy, to tender the premium and test the forfeiture in an action on the policy where by its terms it becomes payable."

If that be correct why is it not applicable to this case? The insured then has two remedies: (1) to elect to consider the policy at an end, (2) and he had a right to put an end to the policy according to its terms.

Now, evidently, the insured undertook to treat this policy as at an end and to recover the full amount that would be payable to him upon his death or at the end of the full term, March, 1894. In this we think he was wrong. He was entitled to recover only the equitable value of the policy. It is said that this question was not saved because in the motion for a new trial it was not claimed as one of the grounds of the motion that the amount found was excessive. The error assigned is, however, that the evidence does not support the judgment; that it is contrary to law. We find both—and the judgment is therefore reversed.

E. Sowers, for plaintiff in error; Hord, Dawley & Hord, for defendant in error.

### CORRUPTING STREAM BY SEWAGE.

[Cuyahoga District Court, March Term, 1879.]

†CITY OF CLEVELAND V. WILLIAM H. BEAUMONT.

1. A city erecting and controlling a work-house is liable in damages for the corruption of a water-course into which it has run sewage of the institution.
2. It is not error to exclude a question asked of the city's civil engineer as to whether the city has adopted a system of sewerage, and districted the city for that purpose; such fact should be proved by the ordinances of the city, to that effect.

HALE, J.

The plaintiff below alleged in his petition in substance that he was the owner of certain premises in that portion of the city formerly known as Newburgh township, through which ran a stream known as Kingsbury run, the water of which he was accustomed to use, and that he resided upon said premises, that the city purchased what is now known as the workhouse lot and erected upon

†Affirmed by supreme court without report, March 27, 1883, 9 B. fly leaf after page 168.

it the workhouse, and in connection therewith built a sewer emptying into this stream above the premises owned by the plaintiff Beaumont for the purpose of the drainage of the lot and carrying off the offal and offensive matter into the stream; and the allegations are that in doing so the waters of the stream were corrupted and thrown upon the premises of the plaintiff, by reason of which the plaintiff was deprived of the use of the water, in consequence of which his premises were much injured and his family became sick, and he brought suit to recover damages of the city based upon that state of facts. A recovery was had in the court below against the city, and it is complained that error was committed in that proceeding: first, that the court erred in overruling a demurrer interposed by the city to the petition. That I will discuss very briefly in connection with another proposition made in the case which goes to the entire case. It is this: that this workhouse or enterprise, whatever it may be, the erection of the building and construction of the sewer—that it is a public penal institution, a part of the system instituted by the state for the preservation of order and the punishment of its offenders, and although to a certain extent under the control of the city, it is in reality a state institution of such a public nature that the city is not liable for anything connected therewith. In support of that proposition a very large number of cases was cited. It is not my purpose to review those cases in detail; suffice it to say we have examined those cases, and in our judgment they undoubtedly establish the doctrine that the city is not liable, for instance, for the negligence or unlawful acts of its police officers; not liable for the negligence of firemen appointed and voted for by the city. It is argued by counsel for the city that these cases establish the doctrine that the city is not liable in this class of cases.

It is claimed on behalf of the defendant in error that this workhouse is a private enterprise of the city, so to speak, at all events of such a character that the city is as liable for any injury done in connection with its operations as a private individual would be under the same circumstances; that a private individual owning the workhouse premises and doing what the city has done would be liable. We think if a private individual had owned these premises, had erected this workhouse, built this sewer and had corrupted this stream—had done precisely what this petition says was done, and what the jury found was done—that there can be no doubt that individual would be liable for the injury done.

Now the city took possession of this property, a conveyance was made to the city; the city built the workhouse and under the statute assumed the control of it. It is wholly within the control of the city.

The complaint in this case is not that any agent of the city has been negligent or acted unlawfully. It is the thing itself that is complained of. The sewer was built by the city. We do not think we can liken this case to the cases that have been cited and relied upon in the argument.

The case decided by the supreme court of Minnesota referred to, is almost identical with this case. In that case it was held that a municipal corporation, under the circumstances existing in that case, is liable to the same extent that a private individual would be. I see no reason why it should not be. If a city needs a man's property and takes it, it must pay for it. The day is gone by when cities, under the claim of improvements, or any claim, can confiscate a man's property. If a city does an injury to any one in building a workhouse or sewer therefrom, I see no reason why it should not be liable just as an individual. At all events we are not disposed to reverse the judgment upon the theory that the city is not liable under the facts alleged in the petition and disclosed in the testimony.

Now, beyond that, there were certain matters growing out of the trial on account of which, it is claimed, this judgment should be reversed; first, the conclusion of evidence and that appears in this form: A man by the name of Force, a civil engineer, was upon the witness stand and was asked the question, "Mr. Force, I will ask you to turn your attention to the stream below Kinsman street, where the sewer now empties; that is a Woodlawn avenue sewer; I will ask you if the stream there is of sufficient capacity to carry off all the sewerage that is turned into the place, including the sewerage from the workhouse." Objected to by attorneys for the plaintiff. That question was withdrawn. "I will ask you, Mr. Force, if the city has adopted a system of sewerage and districted the city in reference to that subject?" That question was objected to by the plaintiff and the objection sustained. Now, that question was simply preliminary, asking if the city has adopted a sewerage system. That was objected to. Strictly, perhaps, that question should have been answered; but the mere fact that the city had adopted a system of sewerage and districted the city, would not be prejudicial one way or the other, unless something further in a legitimate way was offered to be proved. But this question was immediately followed by counsel with this statement: "Counsel for the defense then stated that he desired to prove by this witness upon that point, that the city of Cleveland is districted off into sewer districts, and that this workhouse is in sewer district No. 7, as formed by the authorities of the city of Cleveland by resolutions and ordinances of the city, the workhouse and system of sewerage was adopted and flowed, as it did flow, into a run in the rear of the workhouse, and we wish also to show that the sewers, the main sewers in the several districts of this city, flow into the several streams which respectively flow into the Cuyahoga river and also into the Cuyahoga river and lake. That upon this system in controversy, five main sewers of the city empty in accordance with the sewerage system the city has adopted by the authorities of the city, and that other sewers in various parts of the city empty into streams of a like kind, as well as into the Cuyahoga river and the lake."

Objection was made to that and the court sustained the objection and told the party to go on with the case.

Now, on looking into this whole case, it very plainly appears that this sewer complained of had no connection with anything but this workhouse. Still we are bound to take this offer just as it is; but, under the circumstances, we would not feel authorized \*to go one single step further than we were obliged to go in 173 passing upon this question of evidence; because from the plat and the testimony, taking the whole testimony together, it is plainly shown that this was a private sewer, built from these premises directly to this run, and had no connection with anything else until a year or two after, when the city constructed a sewer upon Kinsman street, and at that time it was changed into that sewer.

Now, what I mean to say is, that legitimate testimony, to prove these facts, should have been before the court, and ruled upon by the court. No ordinance was presented by which it was claimed this sewer had been established, which the court could say was or was not competent, but the facts were proposed to be shown by the witness upon the stand, and not by any record.

We are inclined to hold, under the circumstances of this case, that the proof offered to be made, which was offered as a whole, which was denied and to which exception was taken as a whole, was not legitimate to be made in the way proposed; that if there were any ordinances showing that the city was districted into sewer districts, that those ordinances should have been presented and offered in evidence to prove the fact. We are not disposed to disturb the case on account of the exclusion of this testimony in the shape that it stands.

It is said that the court erred in the charge to the jury. Taking the charge as a whole it was very considerate in view of the character of the case. Certain propositions are singled out which, it is claimed, are erroneous. The first is this: "There is no difficult question of law in this case, and the definitions of a nuisance, which have been read in your hearing, are not controverted by anybody. It is well for you, however, to bear in mind that the law as given you by the court is this: 'It is a maxim of the law that every person, while he has the right to the enjoyment and use of his own property, must so use and enjoy it as not to disturb his neighbor in the enjoyment of his, or in his health, his comfort or his convenience, and this rule applies just as well to a corporation as to an individual, and it applies as well to a municipal corporation—a city—as to a private corporation or manufacturing company. The same rule applies to all persons whether natural or artificial.'" As an abstract proposition we see nothing wrong with it. We think it states a correct principle of law; and in the view we have taken of this case we see no reason why it was not proper to be given in connection with the rest of the charge.

The second proposition in the charge which is complained of is: "Now, although there may be impurities arising from those

other causes, yet unless they are sufficient to account for the destruction of the water to the extent claimed by the plaintiff—and he has shown what he has claimed—and to account for the sickness caused to himself and family, unless those other impurities shall constitute, or the evidence satisfy you that the other impurities caused that, and you are satisfied those impurities would not exist without an extraordinary deposit cast into the stream from the workhouse and its premises, why, this plaintiff would still be entitled to recover, although there might be a portion of the impurities arising from some other source. But the burden of proof is upon the plaintiff in this case. It is incumbent upon him, by a preponderance of the evidence to satisfy you that these impurities of the stream—that the water was spoiled—that the health of himself and family were injured by the impurities cast into the stream by the defendant—by the city."

I read the whole of the clause. Exception is taken to a part of the clause, stopping in the middle of the clause. Taking the whole clause together, it seems to us, that it states it clearly and with remarkable fairness. The last part of the charge objected to is this: "It is not claimed that you would be entitled to return a verdict for mere nominal damages, five cents or ten cents, for a bare breach of or doing a technical or legal thing, but that it must be some substantial, actual damage, and that is a question for you to determine if you find for the plaintiff."

Now, there is an exception to that. It is said that is wrong; that it gave the jury to understand, if they found for the plaintiff they must go up on the damages, they must not stop at a small amount. But it seems to us, all there is of that is to say to the jury, "If you find that this defendant has suffered merely nominal damages, no substantial injury, you must find for the defendant." He goes on to add, in order to make it more definite: "It is not whether you should be stingy or liberal, the question is, what damage actually has the plaintiff sustained? You cannot inflict damages upon the city by way of punishment or by way of teaching the city what to do hereafter,"—that it was no case for exemplary damages; saying that if they find that the plaintiff has suffered substantial damage they cannot go forward and inflict a penalty upon the city. That, it seems to us, was as favorable to the city as it could ask.

The jury retired, and failing to agree were brought into court, and the court was asked a question by the jury, which the court answered in this way: "The defendant had no right to convey sewerage or offal into the stream to such an extent as to damage or injure the plaintiff, and if it did the plaintiff can recover." That statement of the court standing alone is a little *sharp*, but if given to the jury in connection with the rest of the charge before their retirement certainly no fault could be found with it; however, we are not prepared to say that the jury, on receiving this instruction, felt it incumbent upon them to disregard all that the court had said

prior to their retirement, and therefore we think it must be considered in connection with the charge of the court, and so considering it there certainly was no error.

We are relieved from reviewing the case upon the facts. Very likely the verdict is large enough; but looking at the whole case we find no reason for reversing the judgment of the court below.

Heisley, Weh & Wallace, for plaintiff in error; Estep & Burke, for defendant in error.

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**\* RAILROADS—INJURY TO INFANT.**

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[Cuyahoga District Court, March Term, 1879.]

†**DEVEREAUX, RECEIVER V. THORNTON.**

1. If a fence around a railroad track, though not in a place where cattle are, is a protection in keeping out human beings, the fact of its absence imposes a higher degree of care on the company.
2. Where a child of six years is playing near where trains of cars of a railroad company stop and move on at short intervals, the company does not discharge its duty toward such child by simply ordering it away, but it should send it away.
3. It is competent for the parties by agreement to exhibit to the jury, when viewing premises, the operation of the machinery by which the injury was occasioned.

**TIBBALS, J.**

This was an action brought by the plaintiff below, an infant, by a next friend, to recover damages of the receiver, operating the A. & G. W. road, by reason of carelessness in the management of a train upon that road, in consequence of which the plaintiff was run over and its arm mangled, rendering it necessary to amputate it.

It seems that the case took somewhat of a novel course in its trial. The charge was that this railroad company, in the hands of a receiver, while in the act of weighing a train of cars upon grounds belonging to the company, covered by numerous tracks, by reason of the manner in which the weighing was done—the sudden starting up and stopping of the train for the purpose of weighing—was guilty of carelessness in suffering this little boy—being of tender years only four years and a half old,—in company with another little boy, to be upon the grounds, and in not taking caution to relieve itself from responsibility by not properly caring for the child and removing it from danger. Another complaint is that the grounds were not fenced as required by law; that the company was negligent in the manner in which the weighing was done, and negligent in not warning off the child and taking proper care of it.

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†Affirmed by supreme court without report, 10 B. 266.

It seems that the jury were taken to the premises for the purpose of viewing them, and that while thus viewing them, at the suggestion of one or more of the jurors, the employes of the receiver undertook to operate a train for the benefit of the jury in a manner claimed to be similar to the manner in which it was operated at the time of the injury. The jury returned and the trial proceeded.

The facts in the case, sufficient to an understanding of the questions presented for our consideration, are these: The parents of this little boy lived from a quarter to half a mile distant, and without their knowledge this child and another boy came upon the premises and were there, as such boys would be, watching the movements.

The weigh-master, seeing the boys near the weigh-house, ordered them to leave. Shortly after that the little boys were seen upon the opposite side, or, at least, were on the opposite side of the train, and the next that is known of them is that one of them, this plaintiff, was run over and his arm crushed, and he was in the act of running away.

The first question I will undertake to consider is as to the competency of certain evidence. A witness by the name of Davok was asked by the plaintiff the following question: "At the time that this accident occurred, what did any of the employes say about it, if anything?" This was objected to by the defendant as improper, etc. Without any ruling by the court, counsel for the plaintiff said, "My intention was to inquire what was said by those who were connected with the train and with the weighing of these cars, if anything?" Thereupon the objection was overruled by the court and the defendant excepted. Then the question seems to be repeated: "State, Mr. Davok, what, if anything, was said then upon the ground by the employes of the defendant connected with the train that ran over the boy, or connected with the scale-house and scale used at the time for weighing cars in that train, and at the time of the accident, concerning the accident?" The defendant objected. The objection was overruled and the witness answered: "Mr. Norton was with me and was very much shocked when we saw the boy"—[interrupted by Mr. Russell:] "Is that after the boy got hurt?" The plaintiff objected and the objection was sustained and the defendant excepted. Then follows this question: "State what, if anything, Mr. Norton said? A.—He said that he had sent the boys away from the scale-house a short time before; that he told them they must not play there." The defendant objected to the question and answer. The court overruled the objection and exception was taken by defendant. "Q.—Whereabouts were Norton and you standing at the time, during this conversation,—on which side of the cars? A.—We were on the south side; we were some little distance from the scale-house. Q.—How far? A.—Well, I could not say. Q.—And it was right in the midst of the trouble, an excited time? A.—It was right at the time when we saw the boy on the other side of the cars. Q.—



Had he been picked up then? A.—No, sir, not when I saw him. Q.—At the time of the conversation was he still lying on the ground? A.—No, sir, he was up himself and running. Q.—Who was with him when he got on his feet? A.—He was alone; nobody had caught him yet; there was a man running after him that was there, an engineer or fireman from the engine." The objection to that is that it is not a part of the *res gesta*. It is claimed upon the part of the plaintiff that it is.

Now, the thing to be shown as a part of the transaction is that the boy was there; that he was injured, and what occurred in connection with that injury. The fact of the injury, of course, is the very gist of the thing to be shown. Was what was said by the employes of the company so connected with the act of the injury, the negligent act charged, as to make it a part of the *res gesta*? It is true the thing itself related to a somewhat prior occurrence. It did not precisely say just what occurred when the boy was immediately injured. But this rule must have a reasonable construction. It certainly was proper to know just what occurred about that time as distinguished from the opportunity to make up any thing—say anything, thereby separating it from the transaction. Now, this evidence clearly shows that this conversation took place almost in the act of the injury. The boy was almost in the act of being run over; he was knocked down; he was seen down; he was getting up and running away, and they were shocked. In the midst of the transaction he made the remark, "I had just told those boys to leave; they must not be here." Now, it seems to me, upon a fair and liberal construction, that it comes within the rule, that it is a part of the transaction—a part of the injury—had no connection with anything else. It was necessary for the boy to be there or he could not be injured. Although we regard it as a somewhat close question, whether it is within or without the rule, our judgment upon that proposition is that it is within the rule. We therefore hold that the court did not err in admitting the evidence.

The next question which I shall consider is the exception to the refusal to give a certain request in charge to the jury. I have already stated that one of the grounds of negligence charged was the omission of the company to fence this portion of its track surrounding this weigh-house and this yard, as a protection. Five or six requests were made, and all of them given save the third: "That the statute requiring railroads to fence their lines is not addressed or intended to prevent or obstruct human beings from entering upon railroad lands, and the mere absence of a fence about this railroad yard and docks will not authorize you to find a verdict against the defendant in this case."

Now, if the refusal to give that request in charge tended to the prejudice of the defendant, it would seem to be error.

The supreme court have held that it is necessary for the companies to fence their lines or road, and they go so far as to include

their lines in corporations. Possibly the precise question whether that covers the yard and depot grounds and the like, may not have been embodied, but the general proposition is covered. The question of the purpose of that statute has not been determined in this state. It would seem from the language of the statute that the purpose was to protect people who were riding upon the cars, upon the one hand, and to protect stock in adjoining premises upon the other. You must fence suitably to keep stock out; that is for the preservation of stock and of persons. Under a similar statute the supreme court of Wisconsin held in a suit similar to this brought by an infant, that if the jury found that that infant received its injuries by reason of the omission of the company to fence its line of road, the company was liable; evidently based upon the idea that it is a duty imposed upon the company to fence its road, and the omission to fence is negligence upon its part; and if that negligence contributes to an injury, the company is liable, even though the purpose primarily was to keep stock from going upon the road; that the purpose is not simply to protect stock but the lives of persons upon the train. It is claimed that this is not within the reason of the statute. We do not undertake to pass upon that question. We do not deem it necessary to do so. The worst feature of the refusal to give this request in charge appears from the latter part of the request: "The mere absence of a fence about this railroad yard and dock will not authorize you to find a verdict against the defendant." The court refused to say so. The apprehension would be that the effect of the refusal to give that in charge would be to say that the absence of a fence would render the company liable. But it will be noticed that this is only one of the acts of negligence charged. It was not pretended, as appears from the record anywhere, that this alone produced that injury. The case was not tried upon that theory—not submitted to the jury by the court upon that theory. We are inclined to hold, first, that this was a mere abstract proposition as requested. They could with the same propriety single out any other one thing and say that the mere absence of that would not render it liable, and the mere absence of this and the mere absence of the other, and so go through with all the charged acts of negligence, and in that way, perhaps, obtain a charge which would not be correct. But the strong and the prevailing fact with us is the fact that the court cured that in its subsequent charge upon that subject.

The court said afterwards, "Now, another question has been raised here that I must necessarily pass upon. It is claimed that this railway company was guilty, and did not exercise ordinary care or prudence for the reason that they had no fence along the line of their road, no guard; and counsel as among themselves could not agree very well, I perceived, as to the standard that was fixed by the statute. It seems the supreme court, in its wisdom, has declared that the duty of a railway company was to fence its track on both sides from end to end. A legal duty is imposed

upon railway corporations to do this thing, and I say to you, that if you find that this track was not inclosed by a fence and proper guard, then I say to you that the law imposed a higher degree of care upon the railway company than it otherwise would do if there was a fence on both sides of their tracks."

It is claimed by counsel here that it is preposterous to contend that a fence should be built to turn men; that the object of the statute was simply to prevent the approach of cattle; that 179  
\*the legislature simply fixed a standard—that the fence that was established should be of sufficient capacity to turn cattle. The legislature must necessarily fix a standard; they do not say it shall be an iron fence; they do not say it shall be a wooden fence; a straight board fence or a Virginia rail fence; they leave the railway corporation to exercise its judgment in determining the standard of guard to be used, sufficient to turn cattle. That, in my opinion, is the purpose that the legislature had in view. "Now, our supreme court has said where a railroad company fails to do that, that a higher degree of care is imposed upon it by reason of not having this fence, and it is a question for you to consider. You have been on the ground; you have heard all this testimony, and it is a question for you to consider whether that was a place that needed a fence, and ought to have been fenced. If you find a fence unessential, and you find that to be the fact, then I say to you that a higher degree of care is imposed upon that road by reason of the want of that fence. You may take into consideration among other things in determining this question if you find the absence of such a fence contributed to the injury complained of—" Now, very clearly, while that proposition had better have been given in connection with this, than refused, yet we think the court gave the correct rule, that is, if a fence was a protection or if its absence was negligence, it imposed a higher degree of care upon the company to look after the child, therefore the jury might consider that fact as bearing upon the question of the negligence that contributed to the injury. That was really the force and effect of that charge and we find no fault with it in that respect other than the manner in which it was put to the jury. The whole charge has been the subject of careful consideration by counsel on both sides. It has been subjected to very severe criticisms. It is enough for us to say that there are no specific exceptions to the charge given other than the refusal to give that request which we have just passed upon. Therefore, no question can be considered concerning it except that which the court is permitted to by taking it as a whole in connection with all the evidence in the case, to determine whether the jury were misled by it; and that brings us to a general discussion of the case itself. We think the question is an exceedingly close one. The difficulty grows out of this fact: Here was a child clearly shown to be incompetent to take care of itself. As to him the doctrine of imputed negligence could not apply. He was there absolutely free from this principle which would render the com-

pany free from liability because of the child's negligence, so that we must treat the case in that light. Now, what was the duty of the railroad company under such circumstances? Upon the one hand it is claimed by the receiver that it is not the duty of this company to take care of and insure the lives of children who get upon its tracks. That it has a right to run its road in a reasonable manner, and if children are not injured by some positive act of negligence on the part of the company, no liability attaches. While on the other hand it is claimed that the law has fixed upon the company the responsibility of seeing that it does no injury to children incapable of judging and acting for themselves.

Now, we are inclined to hold the latter view of the law to be correct. It will not do to say that a railroad corporation or any other corporation, (but it is not because it is a railroad corporation, or any other corporation—any person, the rule applies to them all,) can do its whole duty by simply directing children to get out of the way of danger when it knows that they are in danger, and when it further knows that they are incapable of caring for each other and for themselves.

In the light of that principle what were the facts in this case? This company engaged in the proper act of weighing its cars. It had a net-work of tracks, covering a wide tract of land, lying bordering upon the docks on the river. It had a weigh-house, had its train of cars; had its employes whose duty it was to weigh the cars. They started up the train, weighed a car, then started up and weighed another, and so on until the whole train was weighed. It is very easy to see that that transaction would be a much more dangerous one to children playing around the train than the running of a train at a rapid rate of speed; although the children are incapable of exercising any judgment upon the subject they would be less likely to go under a train moving at a rapid rate of speed than they would to approach a train standing a part of the time and then suddenly starting up. It is perfectly apparent, because they can see then that the train stands and they have not the slightest idea how soon it will start. They have no ability to determine but what the train may stand there for hours; hence, with perfect safety, under their immature judgment they may approach it. Now, in that situation, if an employe sees a child of that kind about the train, what is his duty? Is it simply to say to that child, "You must not play here; you must run away," the language I have already read? The court told the jury that would not discharge the duty of the company and we agree with the court in that charge, that the company was held to the performance of a higher duty. While it was under no obligations possibly to stop its business, it is under obligation to see that a child is removed from danger. Neither is that duty discharged by simply ordering it away. It is the duty of the company to see that the child is away, out of the reach of danger. It is perfectly manifest that the jury found in this case that *directing* these little boys to leave did not accom-

plish the purpose, and, indeed, counsel admit upon the argument that it was essential to do more than to simply order them away, but to *send* them away, and they argued as if the proof showed they did send them away. The proof does not show that at all. On the other hand, the proof shows very soon thereafter they were on the other side of the train, and that the little boy's arm was crushed by the wheel of one of the cars. Now, it is impossible to say that they sent the child away when the child was there immediately; and the jury could not find that fact. They must have found the reverse, that they did not send them away. True, they set up in their answer that they did, but for reasons which they deemed sufficient they did not undertake to establish that fact; they rested their case upon the evidence made by the plaintiff, and that evidence, although slight, save as you apply this rigid rule—I will not say rigid—this reasonable rule—of law, to their duty, the negligence was found and established. Complaint has been made because the court insisted upon inserting in the bill of exceptions further evidence, that these parties by consent operated that train then. We are unable to see how we can do anything with that. It is in the bill of exceptions that it was done by consent of the parties and that undoubtedly had its effect upon the minds of the jurors. It is impossible for this court to say what that effect was. We do not think it was incompetent for the parties to agree to put it in the case as a matter of agreement. So that taking the case as a whole and looking this proof all over, and in the \*absence of anything on the part of the defense explanatory of 180 their omission to do this plain duty, we are unable to see—we cannot clearly see that the jury erred. We can say that it is a very close case. We can say that there is some doubt whether the jury found correctly, but we cannot go beyond that in the light of all these facts. Nor can we say, taking the charge of the court as a whole, and especially while its language seems somewhat obscure, the requests of the railroad company were clear and very pointed and very distinct, and every one of them were given to the jury save the one to which we have referred. On the whole we have concluded to affirm the judgment.

Otis, Adams & Russell, for plaintiff in error; Henry McKinney, for defendant in error.

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**\* PROCEEDINGS IN AID OF EXECUTION.**

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[Cuyahoga District Court, March Term, 1879.]

†A. M. HARMON V. HENRY WALTER ET AL.

1. Where a referee finds that a third person not a party has money of the debtor: *Held*, that the court cannot order it paid into court, and where a fourth party also claims it, the fact that he was examined as a witness does not conclude him or affect his claim.

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†See 1 Clev., 26. Followed in *Manning v. Manning*, 11 B., 144.

2. A refusal of a court to confirm the finding of a referee appointed by the common pleas court, in proceedings in aid of execution, is not a final order which can be reviewed on error.

LEMMON, J.

This is a petition in error to reverse a ruling in the court of common pleas in refusing to grant an order. A motion was made that the court confirm a report made by a referee in this case and enter an order for the payment by Henderson of moneys which the referee in his report found to be in his hands. The error alleged is that the court of common pleas refused to sustain the motion, although there were no exceptions to the report filed, and that the court of common pleas refused to enter an order for the payment of this money.

The proceeding below in which this report was made was a proceeding in aid of execution. It appears that the plaintiff, A. W. Harmon, in 1877 had obtained a judgment against Henry Walter and Henry B. Myer, which is still unreversed and, in part at least, unsatisfied; execution was issued, and it was returned unsatisfied, there being no property of the defendants in the county out of which the amount of the judgment could be realized. Thereupon proceedings were commenced in aid of execution, and the matter was referred by court of common pleas to R. J. Winters as referee, who was required to take and report the testimony and facts to the court of common pleas, and he has made a very full report in the case. The report is not excepted to, and is, probably, so well sustained by the evidence that the parties felt unwilling to except. A motion was then made, first, for the approval of the report, and second, for an order to be entered by the court of common pleas upon J. M. Henderson for the payment over of the moneys that are found to be in his hands by the referee. The court refused to make an order confirming the report and refused to make an order upon Henderson to pay over this money. It is claimed that the order ought not to have been made for the reason that the finding would not be binding upon parties who were claimants for that money and who were not parties to this proceeding; that although Henderson had this money in his hands, as disclosed by the evidence, he had received it and held it for Mrs. Anna Meyers, who was brought in as a witness for examination in this proceeding.

It was claimed on the one part that because she was examined she ought to be concluded by an order of the court. But she was not a party to this proceeding; she had no right to examine witnesses; she had no control over the matter, and can it be said that she had her day in court? Would an order in this case have been binding upon Adam Meyer? We think not. We think the court of common pleas did not err in refusing to enter this order. We think that proceedings in aid of execution are intended for the purpose of enabling a party to ascertain where there is property, anything that can be subjected to the payment of a judgment; and then, if successful may take such proceedings as shall be necessary

to reach the property. This view of the matter is apparently sustained by the statute itself. Section 469 reads as follows:

"If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained, as between himself and the person or persons holding the real estate, or the person or persons having any lien on, or interest in the same, without controversy as to the interest of such person or persons in such legal estate, or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the debtor's equitable interest therein."

Now, clearly, the legislature has been so guarded in the use of language that we are not warranted in believing that it was intended the court should enter an order for the payment of moneys when the parties, claimants to that money, as disclosed by the proceedings, were not before the court, as parties to the proceeding. We think in this respect the court of common pleas took a correct view of this statute in refusing to enter this order.

But is this a case, even if there was error in the refusal of the court of common pleas to approve the report and to order Henderson to pay over this money, which the district court can review upon error?

This presents the question whether that holding of the court was a final order in the case. The statute upon the subject reads as follows: "A judgment rendered, or final order made by the court of common pleas, superior court of Cleveland, or superior or commercial courts of Cincinnati, may be reversed, vacated or modified by the district court for errors appearing on the record."

Now, was the holding of the court of common pleas upon this motion a final order within the meaning of the statute? The supreme court has very clearly defined what is a final order, in the case of *Hobbs v. Beckwith* (6 O. S., 252). An order in the progress of a suit, and before judgment, to be *final* and lay the foundation for a petition in error, must be such as determines the action and prevents a judgment."

Now, this was not such an order. It does not "determine the action" nor "prevent a judgment." The plaintiff in error has a right to bring his action against Mr. Henderson if Mr. Henderson has in his hands moneys that belong to either of the judgment debtors; may charge him as garnishee, or take any other proceeding proper under the circumstances of the case for the purpose of subjecting that money, and the testimony taken in the proceedings in aid of execution, though not binding upon the parties, would aid them in getting at the facts which were to be determined in fixing the extent of the liability of Mr. Henderson. If the court had entered this order, it could not have affected the rights of Henderson, because it would have been necessary to bring a suit upon the order, and Henderson could answer that other persons claimed the money, and file his answer in the nature of an interpleader, and re-

quire those parties to come in and litigate between themselves, and in that way the party to whom that money belonged might be ascertained, and all the rights of the parties determined.

This proceeding in error to reverse an order, or a refusal to enter an order, under the circumstances an order that could not have been final as between the parties, is not, we think, a proceeding under the statutes of this state, which can be reversed, vacated or modified by this court upon error. The proceeding in error will therefore be dismissed.

Brewer & Wilcox, for plaintiff.

[Cuyahoga Common Pleas, May Term, 1879.]

ESTHER BYERS V. JAMES FOREST.

1. Words charging a person as being a blackmailer and with having blackmailed persons before and having settled the cases, are not actionable *per se*.
2. Words are actionable *per se* only when they impute an indictable offense, some infectious or loathsome disease, or affect a person in his office, trade or profession.

McMATH, J.

This is an action for slander. The petition avers that the defendant spoke of the plaintiff as follows: "She is a blackmailer," "She has already blackmailed five or six persons in the 18th ward," "She has blackmailed persons before and settled the cases in justices' courts." To the petition the defendant demurs, because the words laid are not actionable.

Blackmail is defined to be a certain rent of money, coin or other thing, paid to persons upon, or near the border, being men of influence, and allied with certain robbers and brigands, to be protected from their devastations (Wharton's Law Lexicon, p. 101).

In common parlance it is equivalent to, and synonymous with extortion—the exaction of money either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary.

Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is *moral* compulsion, which neither necessity, nor fear, nor credulity can resist. It cannot be doubted, I think, that "blackmail" is universally regarded as an unlawful act, but is not a crime or misdemeanor involving moral turpitude, known to our law as such.

An action can be maintained for words spoken of another imputing to her the act of blackmailing. No case has been cited in



Ohio, settling this question, and hence it must be decided on general principles. What words, then, are on principle *per se* slanderous?

It may be said, in the first place, that all words, which impute to a party the commission of an act which is indictable, and a conviction of which will subject the party to an infamous punishment, are *per se* actionable, 13 Mass., 248, 6th O. S. R., 228.

These words do not describe a crime or offense known to our law. Words are actionable *per se* only when they impute an indictable offense, some infectious or loathsome disease, or affect a person in his office, trade, profession or calling. On an examination of the cases, such will be found to be the rule as to words actionable *per se*.

There is no rule that words imputing "great moral turpitude" are actionable, because the court may think that respectable, moral people, would not associate with a person guilty of the act charged. The words here alleged come within neither of these three classes, and hence are not actionable, unless the court proceeds to enact a new rule and declare this case as coming within it, and this we shall decline to do.

The demurrer in this case will therefore be sustained.

Foran & Williams, for plaintiff.

R. A. Davidson, for defendant.

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## BILLS AND NOTES.

[Cuyahoga District Court, 1879.]

†ASA HUDSON V. S. P. WALCOTT ET AL.

Although a maker is insolvent and the indorsee indorses the note after it is due, demand and notice are necessary to fix the indorser's liability.

HALE, J.

This was an action in the court below upon a promissory note which the plaintiff held against the maker, Walcott, and his immediate indorser, Burt. The note was transferred to the present plaintiff after it became due and several questions are made which appear in the record. The petition is in the ordinary form of a petition upon a note to charge a maker and indorser, alleging due demand of payment and notice of dishonor to the indorser. The answer is a general denial, denies that demand of payment and notice had been made; and set up that the name of Burt was put upon the note at the time it became due and long before it was transferred to this plaintiff simply for the purpose of placing the note in bank for collection, and that the note was transferred to the present holder under a distinct agreement that there should be no liability upon Burt as indorser. There is no reply to that answer. In this

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† Reversed by supreme court, 39 O. S., 618.

state of the pleadings the case came on for trial. The tendency of the testimony is only set out. It appears that Burt and Hudson reside in this city; that Burt became indebted to Hudson, and having this note, then past due some sixteen months, desired Hudson to take it; that Hudson agreed to take the note if Wolcott said it was all right; and together they went to Kent, where Wolcott resided and where the note had been left at the bank, and took the note from the bank, but not finding Wolcott there they went to Ravenna and saw Wolcott. Hudson first interviewed Wolcott, making inquiry whether the note was all right or not, Wolcott telling him it was all right, that he could not pay it then but would pay it in thirty days. They return to Cleveland. The note is transferred to Hudson and a receipt given applying it upon the account.

Testimony was given on the part of Burt tending to rebut some of the testimony given on the part of the plaintiff.

The errors assigned in the record are, (1) the court erred in admitting testimony offered on the part of the defendant against the objection of the plaintiff; (2) in the charge given to the jury; (3) in the refusal to charge the jury as requested by the plaintiff. The last error assigned I will consider first. The fifth request was this: "If the maker of an overdue note is insolvent and that fact is stated by the indorser to the indorsee at the time of the indorsement, then demand and notice is not necessary to make the indorser liable." Two or three authorities are cited by counsel for the plaintiff below which seem to establish the doctrine that a demand in such a case was not necessary; but the weight of authority is decidedly against that proposition—that although the maker be insolvent and the note is transferred after due that demand of payment and notice to indorser is essential to fix his liability, and in the refusal to give this request we do not think the court erred. The fourth request presents a question of more difficulty. If the question of waiver could be properly made under the pleadings in this case we think that request was proper. The court below could only be justified in a refusal to give this fourth request on the ground that the question was not in the case.

195 \*It is to be observed that in the petition there is an allegation that demand of payment had been made and notice of dishonor given to the indorser. The question is presented whether under the code, the petition containing an allegation of demand and notice proof of a waiver on the part of the indorser of said demand and notice can be made on the trial. We are unable to find any authoritative decision by our supreme court upon this question. Swan in his Pleadings states that it cannot be done; that the facts, if it be demand and notice, or if it be a waiver, whatever facts are relied upon, must be pleaded; that the artificial rule known to the common law has been abrogated by the code. Under the common law system of pleading I suppose it was true that under an allegation of demand and notice an excuse could be given in evidence; whether a waiver could be or not I am not quite clear. I think the

authorities are conflicting upon that proposition. Pomeroy, in his work upon remedies and remedial rights, who has struck nearer the spirit and philosophy of the code than any other writer I know of, states that under a code system of pleading it is no longer allowable to allege the performance of an act and then upon the trial prove an excuse for nonperformance or a waiver of performance of the act. In support of that proposition he cites a case recently decided in the state of Missouri (52 Missouri) under a code with provisions in this respect similar to our own.

We are inclined to hold upon this question that under the code the fact should be pleaded, and the proof should correspond with the allegations. If then the proof failed to establish the allegations, then there is a failure of the proof.

We think there being only the allegations of demand and notice and the proof having gone, under the rule, to that allegation, on the claim on the part of the plaintiff that it tended to prove demand and notice, that this request was properly refused—because there was no such issue between the parties.

The first proposition was in these words and raises the question of the sufficiency of the demand: "If the jury find that Wolcott, the maker of the note described in the petition, was insolvent, and that Burt, the defendant, when he transferred it to plaintiff for a valuable consideration, and had made an effort to collect it of Wolcott and had failed, and if when he transferred it he said to the plaintiff, pointing to his indorsement, 'This is the security I give you for the note,' and the plaintiff said, 'I will take it if Wolcott, the maker, says it is all right, and that he would pay it,' or words to that effect, and then both plaintiff and Burt went to where Wolcott, the maker, was, and the plaintiff had a conversation with Wolcott, asked him if he could pay the note, and Wolcott in substance said that he thought he could pay it soon, or within about thirty days, and the plaintiff communicated to Burt this conversation, and said he would take the note, and then Burt handed him the note, being on the same day, and on the occasion of the visit of plaintiff and Burt to Wolcott to ascertain whether the plaintiff would take the note of Burt, that this state of facts was such demand of payment of the maker by plaintiff and notice to Burt of nonpayment as would make him liable as indorser of the note of plaintiff without further demand and notice."

We think that demand of payment and notice of nonpayment is essential to fix the liability of an indorser. This proposition assumes, that at the time, and we are asked to say, that this was a sufficient demand of payment of the maker by the present holder—a demand of payment before he owned the note, before the contract was completed by which it was transferred. The court was asked to say, assuming that a demand and notice was necessary, that that constituted a demand and notice. We think the court very properly refused to give that request. The plaintiff requested the court to charge the jury that if the jury found the facts as

claimed by the plaintiff to be true, that there was a sufficient demand and notice under the circumstances to entitle the plaintiff to recover. This request was refused. It will be conceded, we take it, that that was too indefinite.

The court charged the jury that the plaintiff, to entitle him to recover, must have been the owner of the note at the time the demand was made, and the plaintiff could not have been the owner of the note at the time the plaintiff talked with the maker of the note at Ravenna, if plaintiff had not then agreed to take the note, and that plaintiff's receiving the note immediately after said talk would not date back and make him the owner of the note at the time when plaintiff talked with Wolcott about Wolcott's being able to pay it.

The court also charged the jury that if they found that on the 27th day of May, 1875, the plaintiff was the owner of the note, and the maker promised to pay it in thirty days, and the indorser agreed to the extension, then, in that case, demand on the maker must be made on the thirtieth day thereafter, without three days of grace and notice given as to the indorser Burt within a reasonable time thereafter; that a demand of payment on the 6th day of July following and notice of nonpayment to the defendant Burt, the indorser, the next day thereafter would not be a sufficient notice to hold the indorser because both parties lived in the same neighborhood."

We have had more trouble with this charge of the court than anything else connected with the case. There are certain expressions in that charge that could not be sustained if they stood alone. That a demand of payment upon one day and notice to the indorser upon the following morning was not sufficient. I do not think that is true. But let us see just exactly what this charge is: The talk at Ravenna, between these three parties, was on the 27th day of May, when it was agreed that this note should be transferred to Burt and Wolcott. The parties have given evidence pro and con of that transaction. Now, that proposition, when we free it from the nonessentials, is this: That when it became due on the 27th of May it was agreed between these three parties that the time upon this note should be extended for thirty days, then demand of payment and notice must be made on the thirtieth day; or, at all events, that it would not be good on the 6th of July, which would be some forty days after. Now, had nothing been said, no agreement made at the time that note was transferred, I entertain no doubt but that the rule would be this; that the demand must be made within a reasonable time, and notice given to the indorser that it stands substantially like a note payable on demand. We are not prepared to say that the court erred in saying that demand on the 6th of July, under those circumstances, would not be sufficient, and that was the only demand that proof was given tending to show had been made, and hence, the whole proposition can be sustained. There is no error in this proposition if it be true that

under the circumstances demand on the 6th of July was insufficient to fix the liability of the indorser.

We are disposed to hold that the court did not err in the charge as given, and in refusing to give the charge upon that particular subject.

\*The defendant also gave testimony tending to show, over 196 the objections of the plaintiff which were overruled by the court, that the plaintiff had agreed at the time of the transfer of the note to him, to take it at his own risk and was not to rely on the defendant Burt as an indorser. Now, as to the tendency of the testimony, the petition only alleged demand and notice on the 27th day of May. That we find to be before the plaintiff owned the note. We find that under the tendency of the testimony the demand upon that day was insufficient. No steps were taken to fix the liability of the indorser. We have held at the present term of the court that as between the immediate parties to the contract that the contract of indorsement is subject to explanation as to the intention of the parties. Had this case been tried upon the issue of a waiver of demand and notice on the part of the indorser we would have been troubled in sustaining this verdict, but on the issues made between the parties we find no error in this record, and the judgment will be affirmed.

Hutchins & Campbell, for plaintiff in error.

W. I. Hudson, for Asa Hudson.

B. W. Haskins, for Burt.

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### BASTARDY.

[Cuyahoga District Court, 1879.]

#### †MATTHIAS JEDLICKA v. THE STATE OF OHIO.

A recognizance in bastardy, conditioned that the putative father shall appear before the common pleas court at the first day of the term thereof, omitting the word "next" before the word "term" will be construed in connection with the statute requiring him to appear at the next term, and will be sustained as a bond which is broken by nonappearance at said term.

TIBBALS, J.

The action below was brought upon a recognizance entered into by Jedlicka and Prosek in a bastardy proceeding before a magistrate for the appearance of Jedlicka at the court of common pleas. The defendant Prosek, while he admits the execution of this instrument attached, he denies the legal conclusion drawn. It is averred in the petition that the recognizance bound him to appear at the next term of the court of common pleas. He says that the recognizance is indefinite, that it does not fix any

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†Affirmed in Prosek v. State, 38 O. S., 606.

time when he was to appear, and that he did appear at a subsequent term of the court in compliance with the recognizance. A demurrer was interposed to that answer and sustained. The errors assigned are, that the petition is insufficient to constitute a cause of action, and the error of the court in overruling the demurrer to the answer. The point made arises upon the condition of the bond, "the said Matthias Jedlicka shall personally appear before the court of common pleas to be holden in and for the county aforesaid, at the first day of the term thereof." The word "next" before the word "term" is omitted. It is simply a question whether that word being omitted he was required to appear at the *next* term of the court.

No authorities have been cited upon either side that precisely settle this question. There are those which hold that such instruments are to be strictly construed; others which relax somewhat that rule. The statute provides in this class of cases that the party shall enter into an undertaking for his appearance at the *next* term of the court to be holden in the county. That this bond is indefinite in omitting the word "next" is certainly true; and we have come to the conclusion in view of all the authorities cited on both sides, that since the statute fixes the time at which the parties shall appear, of which he is bound to take notice, and requires him to appear at the first day of the next term; that this bond should be construed in the light of that statute and the two together should constitute the obligation that he entered into and that it makes the point sufficiently definite to hold him. We have therefore concluded to sustain this undertaking and affirm the judgment below.

Jackson & Pudney, for plaintiff in error.

Wilson & Sykora, for defendant in error.

[Coshocton Common Pleas, April Term, 1879.]

†ALFRED AVERY V. MAGDALENA ROYER ET AL.

Where one claiming under a sheriff's sale ejects parties claiming under a sale by the judgment debtor after sale, but before confirmation, the latter are entitled to the benefit of the occupying claimant's rights, where they are not such vendees, but there are intermediate conveyances duly authenticated and recorded.

VOORHES, J.

On the 20th day of March, 1878, the plaintiff filed his petition in the court of common pleas of Coshocton county, against the defendants, claiming that he had the legal title to, and was entitled to the immediate possession of the following real estate, in said county, to-wit: The S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  section 23, tp. 4, range 6—41

†Affirmed at June term of district court.

acres ; also the N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of said section 23, containing 40 acres; also 70 acres in the 3d quarter tp. and 6th range, described by metes and bounds in his petition. He avers that the defendants, on the 1st day of October, 1875, unlawfully and wrongfully took possession of the same, prayed for judgment for possession and damages.

To the petition the defendants filed their answer, denying that the plaintiff owned the legal estate, or any estate whatever in the said premises, or that he was entitled to the possession thereof.

\*At the February term, 1879, the case was tried and judgment rendered in favor of the plaintiff. That he was entitled 202 to the possession, and that he recover the sum of \$10 for the wrongful detention thereof by the defendants.

Whereupon the defendants filed their motion asking further proceedings under the statute for the relief of occupying claimants upon the lands set forth in said petition, and for the valuation of the improvements by them made upon the same.

The statute of 1878, page 766, provides " that a person in the quiet possession of lands, or tenements, and claiming to own the same, who has obtained title to and is in possession of the same, without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse or better title, until the occupying claimant or his heirs, are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by the commencement of suit on such adverse claim whereby such eviction may be effected, unless such occupying claimant refuse to pay the person so setting up and proving an adverse and better title, the value of the lands without improvements made thereon as aforesaid, and upon demand of the successful claimant or his heirs, as therein provided." One of the provisions is, " when such occupying claimant holds the same by deed, devise, descent, contract or agreement from and under a person claiming title as aforesaid, derived from the records of a public office or by deed duly authenticated and recorded." Section 10 of the same act provides " that the court rendering judgment against the occupying claimant in any case provided by said act, shall, at the request of either party, cause a journal entry thereof to be made, and thereby the right to have a jury to assess the value of all lasting and valuable improvements is secured and the parties entitled to have such other and further proceedings to that end as is provided in the law."

The question now recurs, have these defendants shown that they are entitled as against the plaintiffs to have an assessment of the value of the improvements made upon the lands in the petition described. To determine this, we must inquire into the respective titles and claims to title of this land as made by these parties.

The parties both claim title from one Daniel Welch; the plaintiff by operation of law, and the defendants by the act of the parties.

The plaintiff claims that Joseph E. Williams and others filed their petition in the court of common pleas of Summit county, Ohio, in October, 1853, against said Daniel Welch. That such proceedings were had thereon, that they recovered a judgment against Welch in December, 1853, for the sum of \$186.77. An order of sale was issued by the clerk of Summit county common pleas on the judgment, on the 13th day of May, 1861, directed to sheriff of Coshocton county, Ohio, who, on the 24th day of June, 1861, sold said premises to William H. Upson and N. W. Goodhue, trustees of Henry L. Crowell, Babcock & Hurd, Avery, Hilliard & Co., and H. K. Wells, for the sum of \$1,334. This sale was confirmed by Summit common pleas, at November term, 1861, and the sheriff of Coshocton county ordered to make to the purchasers a deed for the premises so sold. Afterwards, at the January term, 1876, the court of common pleas of said Summit county, ordered the sheriff to make a deed to Goodhue & Upson, trustees as aforesaid, and in pursuance to said order the sheriff of Coshocton county made a deed to Goodhue & Upson, dated March 13th, 1876. On the 27th day of March, 1876, Goodhue & Upson conveyed to Alfred Avery, the plaintiff, the premises in controversy.

The defendants claim title to the same premises by chain of title from Welch, as follows :

Said Welch and wife, by deed bearing date on the 23d day of June, 1868, conveyed the same to Hall, Marvin & Hoy; the two former one undivided one-half, and the latter an undivided one-half, which deed was duly recorded June 25th, 1868. On the 18th day of November, 1869, Hoy and wife conveyed the undivided one-half to Joseph Royer, which was duly recorded December 7th, 1869. On the 19th day of June, 1872, Hall & Marvin, joined by their wives, made a deed to Joseph Royer for the other undivided one-half, which was recorded October 19th, 1872.

Royer and his wife, on the 21st day of May, 1874, made a deed to John Berdenkercher for the whole premises, and this deed was duly executed and recorded June 5th, 1874. John Berdenkercher and wife on the 17th day of June, 1874, deeded the same premises to Magdalena Royer during her life, and to the other defendants in fee simple, and this deed was duly recorded August 26th, 1874. Thus we have traced the titles relied upon by the plaintiff and the defendants to the land in the plaintiff's petition described.

The plaintiff brought his suit to recover the possession of these defendants upon the strength of his title traced to Welch as aforesaid. To defeat his recovery the defendants relied upon the claim of title from Welch as thus stated. Upon the trial the court found for the plaintiff, whereupon the defendants ask for the benefit of the occupying claimant law, and to sustain their claim they rely upon the chain of title by which they supposed they were the owners in fee simple of the premises in controversy.

Does the statute of 1878, which is but the reenactment of the former legislation upon this subject, provide the relief here sought



by the motion of these defendants? is the material question to be answered from the language of the statute.

A person claiming title to premises derived from a party holding the same by a deed duly authenticated and recorded, although he may be ousted from the premises by a party holding a superior title, is still entitled to be compensated for improvements made while in the quiet possession thereof and claiming to own the same, he having obtained his title and possession without fraud or collusion, and he shall not be ousted or turned out of his possession by the person who may have and assert a superior title, until he is paid as provided for in the statute for the improvements made before he is notified of the superior title by the commencement of a suit for his eviction. Is the status of these defendants such as entitles them to the provisions of the occupying claimant statute? The question has already been settled by this court, that the plaintiff has the superior title to this land, and that whatever supposed title the defendants have is derived from a judgment debtor granted after his interest had been so fixed in the law, that his title must take such course as would be given to it by a judicial sale.

In the case of *Vincent v. Lessee of Goddard*, 7th O. R., 2d pt., 138, the question is tersely presented as to whether a title derived from a judgment debtor after a levy made shall entitle the party to the benefit of the occupying claimant act as against a purchaser of the same premises at sheriff's sale, and the answer unequivocally given that such title secures to him no remedy for improvements made under such a title and possession. But whether or not such a purchaser could make a deed to another without notice, who should take possession, quietly hold and make improvements, is not settled by this decision. If such a party is within the purview of this statute and is afforded the remedy of the statute upon the fact being established that his grantor had for the premises a deed duly authenticated and recorded is a question for the solution of which we must again consult the statute, and the interpretation given to it by the courts. 203

In the case of *Lessee of Beardsley v. Chapman*, O. S. R. 1st, 118, the court says: "That the words of the statute 'by deed duly authenticated and recorded,' does not mean the deed of the occupying claimant, but that it does mean the deed of his grantor, and the court here holds that the deeds that will afford the relief under the law is the deed of the occupying claimant, and the deed of the party under whom he holds, and if these deeds are duly authenticated and recorded, purporting to convey a fee simple, and nothing in them indicates that the grantor was not seized of such an estate, then is the occupying claimant entitled to his remedy.

We take it to be clearly settled that if the grantor who conveys to the occupying claimant had for the premises a deed duly authenticated and recorded, and makes a deed in due form to the occupying claimant and he enters into the quiet and peaceable possession,

and makes valuable and lasting improvements, he is entitled to be paid for the same before he can be evicted, unless it shall appear that he had actual notice of the superior title before making his improvements. Counsel claim that Joseph Royer had actual notice of the plaintiff's claim at the time he purchased and received his deed from Hoy, and that this notice is embodied in the deed so made by Hoy. The deed of Hoy is a warranty deed in the usual form, with the additional proviso that Royer and his representatives should permit Hoy and his attorneys to defend the title in whatever court Royer might be sued, and providing further that Royer should do nothing to prevent a fair trial of any claim that might be preferred against the title. And further, that should Royer or his representatives lose their title, the damages for such forfeit of title should be fixed and determined as provided for in said deed.

Taking these provisos as a notice to Royer to beware of the claims of others to the property, to whom would he be referred; by whom could he be informed of a claim upon the premises; to whom or where should he go for such information any more than should every grantee receiving a warranty deed for a farm? He has neither person, place or character of a claim pointed out that was likely ever to be preferred against this property. So we think a fair construction of the provisions in the deeds of Hoy, Hall and Marvin to Royer, furnish no notice whatever to Royer that any person held a claim that would likely arise against the property. They, instead of indicating a claim likely to be preferred, merely aim to provide that they shall have the right to defend against it, and if unsuccessful the amount of damages for which they shall be liable, neither of which will, when fairly considered, amount to anything more as to the confidence they had in the title to the property they were conveying than is manifested by the covenants of warranty in every deed made to convey an interest in land. Then we think it is manifest from the record evidence before us that when Royer received his deeds from Hoy, Hall and Marvin he was seized of an estate in fee simple so far as was manifested by deeds duly authenticated and recorded. And looking at these deeds, the presumption of the law is that Royer had a good title to the land, and that his grantors had not been guilty of a penitentiary offense in conveying to him land to which they had no title.

It is true that Royer may have had such actual notice of an outstanding title or claim to the land that he as an occupying claimant could not have asserted his claim for improvements. And I think, from the testimony of Mr. Stewart, such was the fact. But it is his grantee, if we strike out the trustee, through whom he conveyed his apparent title to these defendants. And would a notice to Royer that would have silenced his right to compensation for improvements, be equally effectual to his grantee without notice—would his fraud be visited upon an innocent party to whom he had conveyed the apparent title, and who had expended money and labor in making lasting and valuable improvements upon the land? Upon

this question we have been furnished no authority for visiting such a penalty upon a party who in confidence of their rights have expended of their money and labor to improve a home, which is now to be swept from them by a superior title of which they were wholly ignorant. We do not think that it makes any difference that this woman and her children received this deed from the husband and parent without a valuable consideration. Love and affection is a good consideration to support a conveyance of land, and when not adverse to the rights of creditors and free from fraud, such a conveyance is just as ample to divest the title of a grantor and invest it in a grantee as though the *quid pro quo* was an exact and full consideration for the conveyance. The grantee would then stand as the owner with full right to make such improvements upon the land as his judgment, taste or desire might prompt. And the power of the law and of the courts is as ample to protect the rights of a party thus invested with a title as by any other means known to the law.

Take it then for granted that these defendants have a title to the land by a deed from Royer duly authenticated and recorded, and that Royer at the time he made to them the deed had a deed or deeds from Hoy, Hall and Marvin, duly executed and recorded, and that they received no notice by the deed from Royer, nor did they have any actual notice of a claim against the title, that they entered into the possession peaceably, and made improvements by building a house, spring house, smoke house, corn crib, and clearing and fencing land. Are they not one of the parties expressly provided for in the statute "as entitled to be paid for all improvements made by them or their grantor before receiving a notice by the commencement of a suit to oust them from their possession?" We are not able to resist the conclusion that these defendants are clearly within the provisions of the statute, and are entitled to have such further proceedings as will bring to them the rights vouchsafed in the law. There can be no doubt but what these defendants would have been as fully invested with the title to the premises had the title of Royer been good as though they were strangers and had paid a full consideration for the conveyance. If so, did they not, in the absence of knowledge of an adverse claim, have the same right to improve that any one would have to improve his property? Would they not have the same right to rely upon the title of Royer, and as much expect to be invested with a clear title from him as though they had been strangers? If, then, they had a right to rely upon their title, they would have a right to improve. There is nothing in the law that would make \*the consideration or the relation of the parties  
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an impediment in the way to recover for improvements made upon an honest belief that they possessed a good title.

Magdalena Royer testifies that she had no knowledge of any claim to this property adverse to her title; that she had in good faith, honestly believing that she and the other defendants had the full title to the premises, made the improvements for which they

now ask to be compensated. Can we defeat this claim without first deciding that a wife and children can not receive a clear title from the parent and ancestor? That in order to make a good title, more than "love and affection" is necessary as a consideration? And that when they receive the title they must take and hold it effected with all effective notices had by the grantor? Such, we think, is not the law, and is not the spirit of the judicial constructions so far announced upon the statute made to afford justice to the parties. When the claimant can say that at the time of making the improvements he was in the peaceable possession, without fraud or collusion; that he had for the premises a deed duly authenticated and recorded, and that his grantor had, as manifested by record, a similar evidence of his title, he not only brings himself within the letter of the law, but is in perfect accord with the judicial construction put upon the statute by the supreme court of the state.

Is it not the language of the statute if the claimant holds the property by deed, devise, descent, contract or agreement from and under a person claiming title by a deed duly authenticated and recorded, that his rights under the statute are complete?

If, then, Royer had a deed duly authenticated and recorded, and had died leaving these defendants as his legal representatives, would they not have had a right to rely upon his title and proceed to improve, with full assurance that if afterwards their title should be defeated, they would have such an interest, that in equity it should be awarded to them? This, I think, could hardly be doubted.

Let the motion prevail and such entry be made in the journal as will secure to them the relief asked.

Campbell & Voorhes for motion.

Spangler, Pomerene & Stansbury, opposed.

### JUDGMENTS—NEW TRIAL.

[Cuyahoga Common Pleas, May Term, 1879.]

†WILLIAM BACKUS V. AURORA FIRE AND MARINE INS. CO.

1. A petition for a new trial does not lie on the ground that judgment by default was taken against defendants through negligence of counsel.
2. An omission to certify in a default judgment, which one of the parties was surety and which principal on an official bond is not such a mistake or omission of the clerk, as will support a petition for a new trial.

McMATH, J.

This a petition filed by these plaintiffs to vacate a judgment of this court rendered September 3d, 1878. They seek to vacate the judgment upon the ground of irregularity in obtaining the same,

†Affirmed by district court, 2 Clev., 299.

and also on the ground of an omission of the clerk in making a certificate.

This suit was originally brought by this defendant, the Aurora Fire and Marine Insurance Company, against these plaintiffs to recover upon a penal bond. It appears from the petition that William Backus was the agent of the Aurora Fire and Marine Insurance Company, and as such agent he gave a bond for the faithful performance of his duties, that he would pay over all moneys that should come into his hands as such agent. There seems, from the statements of the petition in the original action, to have been a defalcation. Thereupon the Aurora Fire and Marine Insurance Company brought suit upon the bond and recovered \$1,090, with interest.

It appears that in the original action the defendants were in default of an answer. They aver in this petition to vacate that they had employed counsel (an officer of this court) to look after their case. They aver in their petition that they were ignorant of the rules of pleading, and relied upon counsel; and they say that through the negligence of counsel no answer was interposed in the original action, and a judgment was taken against them.

Now, if that was all there was of it, there is no doubt but they would have a remedy against their attorney. Their ignorance of the rules of pleading would not warrant the vacation of the judgment. They say that they were not present at the time the default was entered; that they knew nothing at all about it. It was their duty to be present as parties in that action, or to see that counsel was present, and their absence or reliance on counsel would be no excuse and would not warrant the vacation of the judgment rendered. They admit that they were properly summoned, and it is not claimed here that the default was entered before the rule day passed. So that they had their day in court, and had an opportunity to be heard, either in person or by counsel. The judgment which was rendered in the action appears perfectly regular upon its face. It recites the fact that this case came on for hearing. It is not claimed in the petition that it came on out of its order, nor does it appear from the judgment that it came on and was heard out of its order, but it was heard in order upon the pleadings, testimony submitted and the arguments of counsel, and it was the solemn consideration and judgment of the court that the plaintiff in that action should recover against the defendants the sum of \$1,071 and interest. It is not claimed that there was an omission by the clerk to indorse upon the summons originally issued the amount and nature of the demand of the plaintiff. There is no informality pointed out upon which these plaintiffs now rely for a vacation of that judgment. They claim, however, that the clerk omitted to certify in that judgment that Backus was principal and that the other two parties plaintiff here were his sureties upon that penal bond, and they rely upon that omission as a ground for the vacation of the judgment. The statute requires the clerk, it seems, to make that certificate, or, in other words, it requires the court to make the cer-

tificate; but for aught we can see the court had sufficient reason for refusing to make that certificate, and the presumption of law is in favor of the judgment: that it is the proper and only judgment that could have been rendered in the case. For aught that we can see the court may have heard testimony upon that point, and may have determined upon the testimony that no such order should appear on the journal of the court. So that we cannot presume any error, so to speak, in the rendition of the judgment in that respect. If the defendants desired that certificate to be made or ordered by the court, it should have been upon their showing. In other words, they should have affirmatively moved the court to direct the clerk to certify that Backus was principal upon that bond, and that the other two obligors were merely sureties for Backus. So that the omission of the clerk in that respect is no cause for vacating this judgment.

It is true that the case comes within that paragraph of the code that provides for the vacation of a judgment for any omission of the clerk in the rendition of the judgment. We find the judgment is a proper judgment in  
205 \*form. In other words, it contains all the elements of a judgment of the court of common pleas. Every material element is found affirmatively and is set forth in the journal entry making up this judgment. So that it cannot be said, with any regard for the law or the facts, so far as the appearance of the journal is concerned, that there was any error on the part of the clerk in the rendition of the judgment. Suffice it to say that the clerk does not render any judgment. He merely indites the judgment that the court renders. He is the hand of the court for the purpose of putting on the rolls or records of the court the judgment that the court regards as the proper judgment to be rendered in a given case.

It is not claimed here that the judgment was taken out of rule or before answer day. It is not claimed that the clerk failed or omitted to make the indorsement upon the summons. All things are regular. But it is claimed that the judgment was irregularly obtained. That is the averment of the petition, and upon that ground the plaintiffs seek to vacate it.

It is claimed by counsel that the irregularity need not appear of record. But if the judgment is regular of record, can we presume any irregularity aside from it? Are we not concluded by the record? If it contains all of the *formulae* of a judgment, can we presume that there is any irregularity in that judgment? It cannot be shown. These parties say that, in point of fact, no testimony was heard by the court at the time the judgment was rendered. But the judgment says that the testimony was heard. That is the finding of the court. Can we permit an attack to be made upon a judgment of the court by an averment that, in point of fact, the court did not hear testimony, when the court solemnly adjudicates that it did? In contemplation of law, there must be an end to all things—particularly to a law suit; and for very wise reasons, it has been the rulings of the courts for ages that when the court,

having jurisdiction of the subject matter, has determined the matter to be at an end, that should be the end. Our statute gives the party three years to come in and obtain a vacation of that judgment upon a certain showing. But this petition does not contain that showing. If the plaintiffs could show that this court had no jurisdiction of the persons, or that there had been no service on the defendants or any of them against whom judgment was rendered, the court could vacate the judgment so far as these parties are concerned and permit a hearing.

We have examined this petition very carefully, and have considered carefully all the authorities cited in opposition to and in support of the demurrer that has been interposed to the petition, and the conclusion to which we have come is that the demurrer to this petition should be sustained.

Hutchins & Campbell, for plaintiffs.

Mix, Noble & White, for defendants.

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**\*EVIDENCE—NOTARY PUBLIC.**

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[Cuyahoga Common Pleas, May Term, 1879.]

IN RE SIMS.

A notary public in this state has no authority to issue a *subpoena duces tecum*, and therefore has no power to commit a witness for disobedience to such subpoena.—ED. LAW REPORTER.

McMATH, J.

In the matter of the application of Elias Sims for a writ of habeas corpus the relator avers that he is unlawfully deprived and restrained of his liberty by John M. Wilcox. The return of the writ shows that John M. Wilcox detains the relator by virtue of a mittimus directed to him as sheriff of Cuyahoga county by Thomas Reilly, a notary public in and for said county. It is recited in the mittimus that on the 19th day of June, 1879, an action was pending in the court of common pleas of said county wherein T. L. Johnson was plaintiff and the West Side Street Railroad Company defendant, and that in behalf of said plaintiff said notary was taking depositions of witnesses in said action, and that the relator, a resident of said county, then and there appeared as a witness in behalf of said plaintiff, and was sworn and examined as a witness, and while his deposition was there being taken, said witness then and there refused to produce the documents and books required to be produced by the subpoena served upon him, and thereupon the undersigned ordered the said Sims to produce said documents and books, which he again refused to do, and said notary public then and there for the said contempt of the said Sims in so refusing to produce said documents and books, ordered and adjudged that he be imprisoned in the jail of said

county until he produce said documents and books mentioned in said subpoena.

The relator was a witness under subpoena to appear before the notary public; was in the presence of that officer; was proceeding with his testimony, and the same was being reduced to writing in the form of a deposition by the officer. There was no refusal of the relator to testify; he answered such questions as were put to him. Nor did he refuse to subscribe the deposition.

The relator, from aught that appears from the mittimus, did all things that he was required to do in obedience to the writ of *subpoena ad testificandum*.

He had been served with a process issued by the notary public, and from the mittimus we may fairly and reasonably presume that the process served upon him was the writ of *subpoena duces tecum*. This writ from its common law character, is a process of the same kind as the *subpoena ad testificandum*, including a clause of requisition for the witness to *bring with him* and produce books, writings, or other things under his control, which he may be compelled to produce as evidence.

Has a notary public authority to issue the writ of *subpoena duces tecum* and enforce obedience to it?

The answer to this question must be found in the statutes of Ohio, if answered affirmatively.

It cannot be claimed that at common law an officer of this grade had authority to issue the writ of *subpoena duces tecum*. It is a writ of compulsory obligation and effect in the law. In England, before the Stat. 5 Eliz. c. 9., it was otherwise held by the courts, and witnesses were proceeded against as for a contempt when they willfully absented themselves.

But after the enactment of that statute the writ became one of compulsory obligation and effect, and had its origin in the right of the court to resort to means competent to compel the production of written, as well as oral testimony, a right essential to the very existence and constitution of a court of common law, which receives and acts on both descriptions of evidence, and could not possibly proceed with due effect without them.

And though it will be always prudent and proper for a witness, served with such a subpoena, to be prepared to produce specified papers and instruments at the trial, if it be at all likely that the judge will deem such production fit to be there insisted upon, yet it is in every instance a question for the consideration of the judge at *nisi prius*, whether, upon principles of reason and equity, such production should be required by him, and of the court afterwards whether having been there withheld, the party should be punished by attachment. And it may be further said that this writ could only go out of courts of record, and could not issue from inferior courts. Under our statutes a justice of the peace has no authority to issue the writ of *subpoena duces tecum*. Neither usage nor consent confers upon justices such authority.



Sec. 7, chapter 3, page 654, O. L., vol. 75, authorizes the clerks of the several courts and judges of the probate courts, on application of a person having a cause or other matter pending in court, to issue subpœna for witnesses under the seal of the court, etc. The subpœna shall be directed to a person therein named, requiring him to attend at a particular time and place to testify as a witness. This statute thus far has only provided for the issuance of the writ of *subpœna ad testificandum*. But it is further provided in section 8, that the subpœna *ad testificandum* may contain a clause directing the witness to bring with him any book, writing or other thing under his control, which he may be compelled to produce as evidence, and this is the writ of *subpœna duces tecum* of the common law. Here, then, is found the only statutory authority for the issuance of the above writs in the common pleas, superior courts and courts of probate, and while chapter 5, page 988, O. L., vol. 75, authorizes justices to issue subpœnas, etc., it nowhere provides that a clause *duces tecum* may be added. It cannot be claimed that section 6, chapter 15, page 1,027, confers jurisdiction upon a justice of the peace to issue a writ of this kind. An examination of the last cited section discloses the fact that a very material modification of sec. 202, S. & C., page 804, has been made, and in the new section the word "jurisdiction" is omitted. Hence the statute as now in force applies to *proceedings* only. The authority to issue writs is jurisdictional. Now, it is conceded that notaries have the same authority to issue writs of subpœna and compel the attendance of witnesses for the purpose of taking their depositions or for the purpose of perpetuating their testimony, as justices of the peace, and for a refusal to appear before the officer, in obedience to the writ, or a refusal to testify, or a refusal to subscribe the deposition by order of the officer, the witness may be proceeded against by the officer as pointed out by statute. A court or officer having authority to issue a writ has the authority to enforce obedience to it, and while a notary or justice of the peace has authority to issue writs of *subpœna ad testificandum*, the same authority to issue carries with it power to enforce obedience, and this is found in several statutes. But we look in vain in the statutes for authority of a notary \*or justice to enforce obedience to the writ of *subpœna duces tecum*. Then, may it not be safely presumed that if the law-making power did not in terms confer authority on an officer to enforce obedience to a writ issued by him, that the same law-making power withheld from such officer the authority to issue such writ? Now, by turning to section 9, chapter 3, page 655, volume 75, O. L., we find this statute: "When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer."

Now, a notary and justice of the peace are officers "authorized to take depositions," and the attendance of a witness may be enforced by such officer for the purpose of taking such deposition. The deposition is the examination of a witness reduced to writing,

and subscribed by the witness, and authenticated by the officer. He is, under the writ, required to attend as a witness. Then, when in the presence of the officer, he must tell what he knows as bearing upon the issue, subject to the rules governing the admissibility of testimony. This is the "witness" referred to in that section. But the writ of *subpœna duces tecum* requires the person named in the writ to do something else than testify; *i. e.*, to appear and bring with him a certain book or a certain writing, particularly describing it. The book or writing may contain evidence, and it is for the purpose of reaching this evidence the writ has been sued out, and served upon the person having in his possession and under his control the book or writing containing the evidence required. The notary or justice derives his authority to issue the writ of *subpœna ad testificandum* from section 9, but it cannot be said that it authorizes him to issue another and different writ requiring the person named to do some other act than to testify, and enforce obedience. Now, by section 2, page 499, S. & S., a notary shall have the same power to compel the attendance of witnesses, and to punish witnesses *for refusing to testify*, which is or may be by law vested in justices of the peace. It is seen that a justice may compel attendance of witnesses and punish the same for refusal to attend after due service, and may punish witnesses for refusing to testify; but under color of the writ of *subpœna duces tecum* he cannot punish for refusal to obey the writ, for he had not the authority of law to issue it. Hence, I find that a notary public has not authority of law for issuing the writ of *subpœna duces tecum*, and, therefore, has no authority of law to enforce obedience to it.

There are other questions raised by the return of the sheriff that seem to me decisive of this case. It does not appear from the mittimus that the writ of *subpœna duces tecum* had been served on the relator anterior to the 19th inst., nor does it appear that any book or writing was described in the writ, nor does it appear that the book or writing contained evidence pertinent to the issue in the case of *Johnson v. West Side Street Railroad Company*, nor does it appear that the book or writing was in the possession or under the control of the relator at the time the writ of *subpœna* was served on him, nor does it appear but that the writ was served upon him while on the stand giving his testimony and while the same was being reduced to writing by the notary, and time was not given the witness to produce the same.

I therefore find no authority of law for the detention of the relator, and the judgment of the court is that he be discharged from the custody of the sheriff. •

**ALIMONY.**

[Cuyahoga District Court, 1879.]

**COLEMAN V. SHERWOOD.**

A decree allowing alimony, payable at certain dates, on condition that the wife shall relinquish her dower in her husband's real estate, which is not described, requires no election on her part before she is entitled to the same, and she need only be ready and willing to release her claim, on request, whenever a description of the land is given her.

**TIBBALS, J.**

The plaintiff below filed her petition against the defendant as a person and also as administrator of the estate of Martin Asper, deceased. The petition recites that in 1873, the plaintiff was the wife of Martin Asper; that she filed her petition in the court below for a divorce and alimony, and for the restitution of her maiden name. She averred in that petition that her husband had made threats that he would dispose of his property in such a way as to prevent her recovering any alimony in case she should get a decree for alimony against him. The case went to trial and she obtained a divorce and a decree for alimony in the sum of \$1,000. She avers that she then obtained an injunction against her husband enjoining him from disposing of his property, and she avers that in violation of the injunction, and for the purpose of defrauding her, having some real estate in Minnesota valued at about \$8,000, he fraudulently transferred it to the defendant, Sherwood, and that Sherwood had full knowledge of his fraudulent intent, and participated in it; and that he sold the property to some innocent purchaser who is holding the title to the property, and she asks a judgment against Sherwood, her late husband having died since she obtained the divorce. The question arises as to the sufficiency of the averment as to the decree for alimony, which was in these words: "It is further ordered and decreed, that the sum of \$1,000 be laid aside for the plaintiff as alimony, to be paid \$500 on the 1st day of June, 1874, and \$500 on the 1st day of June 1875, interest after due. The payment of said \$1,000 to be made, upon condition that the plaintiff relinquish all right to dower in the real estate of the defendant, and said defendant is ordered and decreed to pay the same with interest after due, or, in default thereof, that execution issue as on judgments at law to pay the same."

Now, the claim is that this petition is sufficient for the reason that this is not an absolute decree to her of this alimony, but simply conditional upon her releasing her claim to dower in any real estate she might have. There is another averment to be read in this connection. "She is now and has been since said decree was rendered, willing and ready to relinquish all claim for dower in the said husband's real estate, if he died seized of any, in which she was entitled

to dower." There is a further averment that there was some land in Tennessee, but that it was substantially valueless.

Now, in the light of these averments, is that petition sufficient? It is claimed that as a condition precedent she should release her dower in his real estate—that she shall elect to do that and do it before she has a right to claim this thousand dollars or can proceed in its collection; or if that be not true, then it may be likened to the mutual condition—that she must be ready to do it. We are not disposed to regard this as one of those cases requiring any election at all on her part. The language of the decree is absolute in its terms. It decrees her one thousand dollars. It makes it payable at two fixed periods; provides that it shall draw interest, and further, that on default of payment, execution shall issue thereon. It is true it contains the language that payments are to be made upon condition that she release her dower in any real estate of which he may die seized.

Now, what should she do? How can she release her dower? There is not anything to indicate that the husband died seized of a foot of land, unless it be the averment that there is some in Tennessee.

212 Where is she to go to do it? How is she to get a description of the land? How is she to execute this release? Where is she to file her release? With the clerk, when the clerk is directed to issue an execution for the payment of the plaintiff? Who is to determine that question, and where and in what way is it to be determined, that she is to release it? The most that could be said would be that if he has real estate, and she issues execution, he has a right to insist upon her executing that release, and if she fails to do it in accordance with the terms of the decree, then evidently she would be restrained from the collection of that decree for alimony. But how can it be said that that is something which she shall do first? It would seem that the two propositions were to go together, but if there is no evidence to her that he had any real estate, if it is not her power to find out whether he had any real estate, she has a right to the alimony, and if hereafter she should undertake to set up any claim for dower, then would be the time to raise the question that, having elected to take alimony, she would be barred and estopped from making any claim to dower, and the court would so decree.

With this view, it follows that the demurrer ought to have been overruled. The judgment of the court below is erroneous and will be reversed.

**\*DECEIT.**

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[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

**FOREMAN V. COMPTON.**

If a seller's representations as to the location and quality of his lands, though relied on, are stated by him to be repetitions of what others made to him when he bought, and he states that he never saw the lands, and knows nothing about them, this if honestly said, is not actionable deceit.

HALE, J.

The action below was brought by Foreman to recover damages for a fraud alleged to have been practiced upon him by the defendant in an exchange of real estate. The petitioner alleges that on May 2, 1876, he was the owner of a house and lot in this \*city, and that on that day he entered into a contract with the defendant Compton by which he conveyed that house and lot to Compton; that the price agreed upon for the house and lot was some \$18,000, in part payment of which Compton conveyed to him a section of land in the state of Iowa, also forty lots which were alleged to be in an addition to the village of Highland Park in the state of Illinois. Certain representations are alleged to have been made by Compton in relation to this property. The allegation is that Compton, to induce Foreman to take the property at the price, represented that the Iowa property was good farming lands situated within two miles and a half of a flourishing village, etc.,—a general representation as to its location, condition and quality, and it is alleged that all those representations were untrue. So of the property in Illinois which was represented to be an allotment within a certain distance of the village, when in fact there was no allotment at the time the contract was made.

The tendency of the testimony only is set out. I shall refer to but a small portion of that, which is this: The defendant gave testimony tending to prove that in making said contract and in the negotiations in reference thereto the defendant Compton informed the plaintiff, that the defendant had never seen the land or said lots in Compton's addition of said land in said state of Iowa, and that what the defendant said about that was only what he had heard from others. To meet that condition of the testimony the court gave this charge: "It is a well settled rule of law that parties entering into a contract are each required to act in good faith with the other. The law contemplates good faith. Good faith is manifested frequently in various ways,—by the acts of parties, the declarations of parties and their surroundings, so that when you come to consider the question you may inquire, were these representations as stated by this plaintiff made on the part of the defendant. If they were, did the plaintiff rely upon them? Because, if he did not rely upon them

he would not be entitled to recover. If he did rely upon them, then inquire into the character and quality of this land, putting it with the representations made and were they relied upon. Now, it is claimed that the defendant said that he never saw the lands, but got them from some person and that the representations that he received with the land were the representations that he made to the plaintiff at the time. Now, that is sometimes done by men, but the law stamps that representation as a representation of the party and makes them and adopts them as his own. If a man says, "I know nothing about this land, but my agent or neighbor who lives beside this land represented it to me as being good farming land and grazing land, I know nothing about it myself, that is, he says he knows nothing about it himself,—that becomes a representation of the party thus making it unless he says avowedly, "depend not upon my representation; you must see the land for yourself or consult with your friends who may live near the land and depend solely upon what he says." The law will not encourage falsehood. It is not the policy of the law to encourage falsehood. It is not the policy of the law to encourage that species of representation that are put upon John Smith's shoulders by John Jones. For instance, if Jones represents that his information comes from Smith and he puts that forward to you, you have a right to rely,—that that is his representation and if you rely upon it he is responsible for the act. On the other hand it is claimed this defendant did not know anything about the land; that he had no means of knowing; that he relied solely upon the representation of the other. Well, if he knew nothing of the land and represented the land to be of a certain quality and character when in point of fact it was not, he is just as much responsible for that act as though he had known what the quality of the land was and had misrepresented it. On this proposition good faith and good morals go together, and the law has never yielded one iota in the union of these two principles."

We are asked to reverse the judgment in this case on that charge. We suppose the law to be that if a person pending a negotiation makes a material representation as within his own knowledge of a fact that he knows nothing about and it turns out that the representation is false, that it is fraudulent. If he makes a statement that he knows nothing about—has no information upon—as within his own knowledge, the other party has a right to rely upon the representations as of a fact that he did know and it may be a fraud. But that is not this charge. This charge says: If he does not know anything about it and tells the party at the time he does not know anything about it, but tells him that all he knew about it he derived from others—just what he did know about it—that it is fraudulent. We supposed the rule in such a case was that you must go one step further and prove knowledge on his part. If he undertakes merely to repeat what another told him, does it honestly, and it turns out to be false, in order to hold him for a fraudulent misrepresentation it is necessary to bring knowledge home to him

to show he was in fault. If he has acted honestly in simply repeating what another has told him, we do not think he can be held to be liable. This charge leaves out that element entirely. The jury might well have understood from this charge that if this man owning lands in Illinois and Iowa, had said to Mr. Foreman at the time of this trade that he knew nothing about these lands, but he had been told their condition was such and such, and that Foreman relied upon that without any reference to whether Compton was acting in good faith or bad faith, they were to render a verdict against him, Compton. We do not think that is the law. We have heard this charge read over and have read it carefully again, and there is nothing in it that would cure this error of law contained in the passage that I have read. Indeed it is not a charge, the province of which is to cure anything; and for this error, without looking into the other errors, we feel compelled to reverse this judgment.

John W. Heisley, for plaintiff.

Estep & Spuire, for defendant.

### EVIDENCE—SET-OFF.

[Cuyahoga District Court, 1879.]

#### MCGEE V. THE CLEVELAND ORGAN CO.

1. In an action against two persons jointly for the price of goods sold them, plaintiff may offer in evidence his books, showing that the goods were charged to both, and such evidence is competent, though the entry was made without defendant's knowledge.
2. One of the defendants cannot set off a separate debt against the joint debt.

TIBBALS, J.

The Cleveland Organ Co., a corporation organized under the laws of this state, commenced an action in the court below against G. W. McGee and William L. Higgins, upon an account for two organs alleged in the petition to have been sold jointly to the defendants. McGee filed an answer in which he set up an individual claim against the plaintiff as a set-off to the claim of the plaintiff against the two. The court below held that under the issues in the case he could not set off his individual claim against the claim of the plaintiff, that being against him and his co-defendant jointly.

\*It is claimed in argument that the relation of surety might be shown between the defendant and thereby entitle proof of a set-off claim to be made, but there was no such claim made in his answer, and the proof in nowise tended to show anything of the kind.

We understand it to be a well settled rule that parties cannot set-off an individual claim against a joint claim, and the court ruled correctly upon that proposition.

The bill of exceptions shows that the account books of the plaintiff were offered in evidence from which it appears that the two organs were charged to these defendants jointly, giving dates and names. No objection whatever was taken to the introduction of the evidence until the giving of the charge to the jury. Then the defendants requested the court to charge that entries made by the plaintiff on its books, without the knowledge or consent of defendants, could not in any manner bind them or be competent evidence for the plaintiff tending to prove any connection on the part of Higgins with the transaction involved in this suit. The court refused to give that request under the issues that were made and the evidence offered in the case. We see no error in that. The suit was founded on an account and the evidence offered was competent. Its weight or effect would be a matter entirely for the jury under the charge of the court. We think there is no error, and the judgment will be affirmed.

M. B. Gary, for plaintiff.

Caldwell & Sherwood, for defendants.

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## \*BILLS AND NOTES.

[Cuyahoga District Court, 1879.]

[Watson, Hale and Tibbals, J. J.]

†SHERWIN, WILLIAMS & CO. v. D. H. BRIGHAM.

October 20, 1875, D. H. B. wrote to C. A. B.: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft." C. A. B. was then in embarrassed circumstances. November 15, 1875, C. A. B. indorsed to S., W. & Co. two drafts on D. H. B., dated November 12 and 15 respectively, to take up notes previously given by C. A. B. to S., W. & Co. *Held*: That D. H. B. is not liable in an action by S., W. & Co. for the amount of the drafts, S., W. & Co., at the time the drafts were transferred to them, having knowledge of the insolvency of C. A. B.—[ED. LAW REPORTER.

TIBBALS, J.

The errors assigned in the record in this case are, that the court erred in overruling the demurrer of the plaintiff to the answer of the defendant, and in its instructions to the jury. Those instructions were that the plaintiff had entirely failed to make out a case and instructing the jury to return a verdict for the defendant. That instruction was based substantially upon the point made on demurrer, so that the decision of those two questions will dispose of the case. The case is one of considerable importance to the parties, and presents rather a close question. The plaintiffs be-

†Affirmed by supreme court, 390, O. S. 137. For common pleas decision see 1 Clev., 22.



low filed their petition in which they recite generally that one C. A. Brigham, doing business in this city under the name of Cleveland Furniture Co., upon two different occasions, executed two notes, one for \$505.50 and another for \$1,500, payable to the order of Sherwin, Williams & Co.; that Sherwin, Williams & Co., at the request and for the benefit of C. A. Brigham, indorsed those notes so that the funds received by a discount at the bank were for the benefit of C. A. Brigham. They remained upon those notes as indorsers, simply liable as such. It recites further that about the 20th day of October, 1875, said C. A. Brigham became embarrassed in business, and so notified the defendant D. H. Brigham, a brother residing in Massachusetts and doing business there in the name of D. H. Brigham & Co.; and thereupon defendant wrote and sent by mail to C. A. Brigham a certain letter, a copy of which is annexed to the petition and made a part of it, and that the letters D. H. B. & Co. were understood by all the parties to mean the firm of D. H. Brigham & Co. That on the 12th day of November, 1875, the said C. A. Brigham showed and exhibited the said letter to said firm of Sherwin, Williams & Co., also two drafts drawn by C. A. Brigham on and to the said firm of D. H. Brigham & Co., at Springfield, Mass., dated November 12th and 15th respectively, in the sum of one thousand dollars each, payable ninety days after date to the order of C. A. Brigham in the name of Cleveland Furniture Co., and by him the same was indorsed as payable to the order of Sherwin, Williams & Co., and thereupon he requested them to take up and pay the two notes on which they were indorsers, discounted as aforesaid, and receive from C. A. Brigham in consideration therefor the two drafts thus exhibited to him in connection with that letter, with the understanding that C. A. Brigham should pay to Sherwin, Williams & Co., the regular bank discount upon the sum of said two drafts for said ninety days. They further say that in consideration of the premises, said Sherwin, Williams & Co. did rely upon the promise and the agreement of the defendant contained in the letter, agreeing to honor the drafts of the said C. A. Brigham—that they would take up the notes so discounted, and in consideration thereof the money was to be paid as aforesaid, that said Sherwin, Williams & Co. received the two drafts and became the owners thereof and are now the owners. That said Sherwin, Williams & Co., in pursuance of said agreement, took up and paid the notes, and that said drafts were immediately forwarded to Springfield and presented to said D. H. Brigham & Co. for acceptance and acceptance refused; that when they respectively became due they were again presented for payment and payment was refused.

There is a further averment that C. A. Brigham was utterly insolvent, and they ask a judgment against the brother in Springfield for the amount of those drafts, \$2,000.

To that petition D. A. Brigham files his answer, and the facts therein stated are briefly these: It is denied that either of the

drafts was delivered to the defendant on the 12th of November, 1875, but were never presented until the 16th of November; and he says that on the 12th of November, 1875, these two drafts drawn upon the firm of D. H. Brigham & Co. were presented to the National City Bank for the purpose of having them discounted; that they were indorsed to J. F. Whitelaw as cashier; that the bank refused to discount them, and thereupon, on the 15th of November, three days later, C. A. Brigham took the drafts from the bank and presented them to these plaintiffs; that they had knowledge of the refusal of this bank to discount the drafts, and he requested them substantially to take them in payment of that indebtedness, so that they might assume it themselves and take up the paper, and that they did so, and it is averred that because of the indorsement upon the backs of the drafts to J. F. Whitelaw, cashier, they desired to have it erased—changed—and they returned them for that purpose, requesting new drafts to be made out. This being on the afternoon of the 15th, it was not done, but it was done upon the 16th. New drafts were given for precisely the same amount. In fact, they were duplicates of those, excepting the omission of the name of the cashier upon the back. But he says that upon the same day, the 16th, and before these new drafts were returned to the plaintiffs, C. A. Brigham had made a general assignment for the benefit of all his creditors, and that the drafts, although doubting the authority to deliver them, at that time under his charge, states that at the request of the plaintiffs and on their demand, it was a part of the agreement, it was done and they were delivered to him, and that they immediately telegraphed to D. H. Brigham to accept these drafts or to pay them.

This brings us to the point which renders it necessary to read the letter, which is dated October 20, 1875, and contains the following: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft, making it four months if they will; if not, three months, and we will honor it, one or two thousand dollar drafts, and trust it will make you easy. [Signed] D. H. Brigham."

229 \*Several propositions of law were very forcibly presented, and we might say as to them we would have but little trouble supporting the view taken by the plaintiffs in this case that there was a sufficient consideration for it, that plaintiffs had a right to rely upon it from this letter, addressed as it was to a brother and shown to them. Those facts would not give us trouble. But the serious question in the case is whether the letter will bear the construction claimed by the plaintiff in view of the changed facts. It will be borne in mind that this letter is dated the 20th of October. At that time, it is true, the brother, C. A. Brigham, was in embarrassed circumstances, and the Springfield brother was aware of it, and undoubtedly undertook to relieve him from that embarrassment by writing that letter. But what followed that? On the 12th of November following, a few weeks thereafter (and weeks are import-

ant in business matters of this character), this brother presented those drafts to his bank and sought there to do precisely what clearly it was intended he should do, to get them discounted at his bank on as long a time as he could, for the purpose, as the letter expressed it of "making him easy." He failed to get that done. For some reason, his bank was unwilling to trust him—unwilling to discount the paper—refused to do it. Three days thereafter, being unable to meet his paper which was indorsed by these plaintiffs, undoubtedly feeling desirous of protecting them, he presented these drafts to them, not for the purpose of raising money to carry on his business, not for the purpose of "making him easy," but only for the purpose of indemnifying these plaintiffs from their liability upon this \$2,000 of paper; and he undertook to do it for that very purpose so that they might be safe. We might say this would scarcely come within the intent of that letter. It would not relieve him. It would be singling out one creditor, and paying that single debt to that creditor, leaving him in his embarrassed circumstances as to all of his other creditors. We hardly think the brother intended such a use to be made of that letter. That would not accomplish the purpose for which he was rendering himself voluntarily liable to the amount of \$2,000. It was not his intention to aid him in that way. But these plaintiffs, finding upon the same day, the 15th, that this paper was not in good shape, and not desiring to present it to their bank, perhaps the Merchant's National Bank, for discount, took it back and requested him to give new paper. While he evidently from the 15th seeing what was inevitably going on the next day, hesitated, but said, as shown by the bill of exceptions, that he would do it; he would sign it over to them—give them new paper precisely like the old.

Now it is claimed on the part of the defendant that the new paper is not equivalent to the old at all—that it is only substituting new paper for the old. The dates were the same, the parties are the same and the papers are the same all the way through. He did not return the paper that evening, and the next morning the plaintiffs sent for him and demanded it, saying it was their paper and it should be done in accordance with their agreement. He then stated to them that he had made an assignment to an assignee for the benefit of all his creditors, and did not know that he had any power or authority to do it—he doubted his authority to give new paper, and called upon counsel, and counsel doubted the authority to draw upon that brother in Springfield, who had no knowledge at all of this transaction, and placing it simply on the ground that he had agreed to, and ought to keep his word, the attorney and party agreed to take and deliver the new paper in that way. After this assignment had been made, they at once telegraphed the party, and, of course, he knew all about it, and the paper was refused.

Now, ought we to say in the light of these facts, that this letter ought to be treated as an agreement on the part of D. H. Brigham

to accept those drafts? We feel constrained to hold that it should not be so treated. It would hardly be within the spirit and intent of that letter under such a changed state of the facts as to these parties. From the time that had elapsed and the peculiar circumstances surrounding the giving of this paper, treating it even as paper of the day before, we feel that we would not be justified in so holding. We are not absolutely certain about it. Of course, courts cannot be. In this view, we follow the view taken by the court below, both as to overruling the demurrer to the answer and as to the correctness of the charge to the jury that the plaintiffs had utterly failed to make out any case, and the judgment will be affirmed with costs.

Ingersoll & Williamson, for plaintiff in error.

Prentiss & Vorce, for defendants in error.

[The decision of the common pleas court in the above case will be found in vol. 1, page 22, of the LAW REPORTER.]

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## \*BILL AND NOTES.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

DEXTER B. CHAMBERS V. VILAS NATIONAL BANK.

Where C. is sued as maker of a note signed C. & Co., and payable to W. & Co., C. may set up and prove in defense that he was not a member of the firm, but merely an employee, which fact was known to all parties, and under these circumstances, C. can not be held liable on the note.

WATSON, J.

The action below in this case was brought upon three promissory notes payable to the order of White & Co., and signed by Chambers & Co., and they were for various amounts designated in the notes. Chambers is the only defendant who makes any defense, the action being against him and a man by the name of Dodge, and he sets up, in substance, that there was no such firm as Chambers & Co., and that he was not a member of any such firm; that Chambers & Co. meant only A. P. G. Dodge, and that Dodge executed the note, and that its execution was only a device for the purpose of raising money; that it was given for no indebtedness to White & Co., and that instead of using the name of Dodge the name of Chambers & Co. was used, and it went to White & Co. in furtherance of the general object of raising money. He says that there was no consideration for the note; that he was in no way a party to it, and that these facts were all known by White & Co. and by the plaintiff when the plaintiff obtained the note by discount.

When the case came on for trial in the court below, the de-

defendant, in order to make out his defense, asked this question : " You may state what knowledge White & Co. had or any member of the firm had of your relation to Dodge ? " He says his relation to Dodge was to transact business for him under a salary ; that he had no interest in the business ; that he was an employee of Dodge to do Dodge's business. This question was objected to by the attorney for the plaintiff. Judge Burke then stated what he proposed to prove by the answer to the question. " I propose to prove in answer to the question that Chambers was well acquainted with the firm of White & Co., and they with him, and at the time this paper was issued, they knew he was not a member of the firm of Chambers & Co. " The court then sustained the objection and the defendant excepted. Then Judge Burke (counsel for defendant) says : " I want to prove in addition to that by the witness that Mr. A. G. P. Dodge, who did the business in the name of Chambers & Co., was himself a member of the firm of White & Co., and that he knew, as a member of the firm, that this was only his own paper. " To that objection was made, the objection sustained and the defendant excepted. Then the question was asked : " You may state at the time this paper was issued, what knowledge White & Co. had in regard to whose paper it was. " Same objection, ruling and exception. Judge Burke then stated : " I expect to prove in answer to that question that White & Co. knew it was the paper of A. G. P. Dodge made in the name of Chambers & Co. "

We were anxious to know, when this case was being argued, whether these objections were to the form or whether it was a mere question of the order of testimony, and we learned that the record did not disclose ; but we learned from counsel that, in fact, no such objection was relied upon, but that the decisions were made upon the broad grounds of competency and relevancy.

Now, we think in this, the court of common pleas committed an error. Those questions were pertinent. It was a part of the defense. It was a part of the issue to be tried. The allegation was that White & Co., when they received these notes, did actually know the relation that Chambers bore to Dodge ; that they knew that the firm of Chambers & Co. was a mere nominal thing ; that it simply meant Dodge, that Dodge was himself a partner in the firm of White & Co., and that the firms, in the matter, were acting together for the purpose of raising money and there was no real consideration for the notes. The defendant further alleged that this was all known to the plaintiffs when they took this paper.

As a part of the defense we hold that the testimony was at the time \*competent and the court erred in ruling it out. The case 236 will therefore be reversed and remanded.

Burke & Sanders, for plaintiff.

Haskins & Campbell, for defendant.

**SIDEWALKS—NUISANCE.**

[Cuyahoga District Court, March Term, 1879.]

Rouse, Lemmon and Finnefrock, JJ.

**MOLHUMES V. CITY OF CLEVELAND.**

A person has no right to construct steps from his house into the sidewalk so as obstruct to the passage thereon, and if he does, it is a nuisance, and the city may remove the steps or prosecute him for maintaining them.

ROUSE, J.

This case comes into this court on error to the judgment of the court below in sustaining a demurrer to the petition. The petition alleges that in 1878 the plaintiff was the owner of certain premises, a house and two lots, abutting on Broadway; that the city council in May, 1878, passed an ordinance for the grading and paving of Broadway, and in July the contract was let for that purpose; that the street was graded according to the specifications of the ordinance for the improvement; that, in making the road-bed and sidewalks, the city constructed a sidewalk on the side of property owned by the plaintiff but six feet in width; that on the opposite side they made it eighteen feet in width, and that there was an ordinance of the city council at the time that every person who made a sidewalk where the street was four rods wide, should make it fourteen feet in width, whereas this was made but six; and the petitioner, in order to enter his house, which, it seems, was close up to the line of the street, erected steps, and the sidewalk being only six feet in width, it was necessary to make the steps very steep in order to leave room on the sidewalk for passengers to go by, and so steep that it practically operated to prevent his renting the house, and he has been damaged thereby; that the value of the rent of the house was thirty dollars a month, and that the house could have been rented for that sum per month, if proper steps had been constructed, and he asks damages therefor to the amount of one thousand dollars and over.

The plaintiff sets forth that the street was cut down and graded, by an ordinance passed in May, 1878, between three and four feet. Before that could be done, it was necessary for the city to pass a resolution declaring the necessity of the improvement, notice of which should be published for two weeks, calling upon all parties who would be damaged thereby to file their claims for damages within four weeks from the time of the publication of the resolution; and then after the improvement was made, the parties who had filed their claims could come in and recover their damages.

Now, it must be presumed that the city did its duty in this respect; that claims for damages were filed, and that after the improvement was made, damages were adjudged by the probate court, and the rule of damages in this case would be what it would

cost to lower the building to the present grade of the street. After an improvement, every man has a right to have his building upon the grade of the street. It was admitted in the argument that a claim for damages was filed and damages were awarded.

Now, it seems that the party, although he recovered his damages, which would have enabled him to lower his building to the present grade of the street, put his damages into his pocket and allowed his building to stand where it was and constructed the steps before referred to; so that the real cause of the damage of which he complains is that the sidewalk is so narrow that he cannot, from the front of his building construct steps sufficiently slanting to be easy of access, without placing them so far into the sidewalk as to prevent the passage of persons upon the sidewalk.

Now, if the plaintiff had made use of the money he recovered as damages and lowered his building to the grade of the street, none of this trouble could have arisen. No party has a right to put steps in the street at all. If he does so, he commits a nuisance, and the city might remove the steps or prosecute him for maintaining a nuisance. The action is really then brought because this sidewalk is so narrow that the plaintiff cannot put there so extensive a nuisance as he desires by putting in as long slanting steps as would be convenient to get into his house. We think the demurrer to this petition is well taken.

The question as to the city constructing a sidewalk only six feet in width on one side of the street and eighteen feet on the other, whatever our views might be upon it in a proper case, does not arise in this. The claim here is simply one of a right to commit a nuisance. The judgment of the court of common pleas is affirmed.

F. H. Kelley and Otto Arnold, for plaintiff in error.  
Heisley & Weh, for defendant in error.

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**\*ATTORNEY AND CLIENT.—NEW TRIAL.**

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[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

†JOSEPH STOPPEL V. ADOLPH WOOLNER ET AL.

1. In an action to reach property alleged to be sold in fraud of creditors, the attorney of the first grantee with his consent, may testify to facts obtained in his capacity as attorney, without the consent of the other parties to the transaction.
2. Where the bailiff having charge of a jury, went to them several times after their retirement, and told them to hurry as the court was waiting for them; *Heid*, to be no ground for a new trial if it was done without corruption and not prompted by, either party, and there appears to be no prejudice resulting.

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†Reversed by supreme court without report on authority of 37 O. S. 194; 8 B. 235.

HALE, J.

In this case but two questions are raised. It is only necessary to state the evidence as it may bear upon those two questions. The defendant in error, on the 29th day of April, 1875, commenced an action against A. A. Stoppel, who was doing business on Michigan street in this city, and a writ of garnishment was issued in that case and process served upon Joseph Stoppel, the father of A. A. Stoppel. A judgment was rendered in the case at the May Term of 1875, of the superior court of this city, against the defendant Stoppel. In that case Joseph Stoppel appeared in obedience to the order of garnishment, and answered that he had no property in his hands belonging to A. A. Stoppel. After the judgment had been obtained against A. A. Stoppel, suit was commenced by the defendants in error against Joseph Stoppel, alleging that his answer was false, that he really did have a large amount of property in his possession belonging to A. A. Stoppel, specifically describing it. The petition was afterwards amended, and it then alleged, that on the 26th of January, 1875, A. A. Stoppel was in possession of this store and its contents, and for the purpose of defrauding his creditors he transferred the whole of the property to a man by the name of Rettberg; that Rettberg held it until the 10th of April, 1875, when he transferred it to Joseph Stoppel, the father of A. A. Stoppel; that both of these transactions were fraudulent, and known to be such by the parties. The case went to trial and the plaintiff below gave evidence tending to establish the fact that A. A. Stoppel owned these notes; that they were fraudulently transferred to Rettberg and that Rettberg transferred them to Joseph Stoppel for the same fraudulent purpose; that there was a combination between these three parties to cheat the creditors of A. A. Stoppel. The defendant Joseph Stoppel, to maintain the issue upon his part called Rettberg, and Rettberg testified that the transaction was a *bona fide* one; that A. A. Stoppel owed him \$2,100, and as consideration of the transfer, he assumed to pay a debt that A. A. Stoppel owed to Joseph Stoppel. O. H. Bentley, an attorney, was also called, and it is to his testimony that exception is taken. He was put upon the witness stand and inquired of as to the conversation with Mr. Rettberg, for the purpose of rebutting the testimony of Rettberg. Before the question asked was answered, counsel for the defendant inquired as to whether the statement the witness was about to make was a statement of facts obtained by the witness while acting in the capacity of attorney for Rettberg, and the witness answered that it was; that it was a conversation and concerned the transfer of the property. The witness then inquired if Mr. Rettberg consented to his making the statement, and the attorney for the plaintiff answered that Mr. Rettberg had consented. Objection was made by the defendant. The court overruled the objection and the defendant excepted. Two objections are taken to this testimony. First, it is said that none of these parties consented to Bentley's testifying except Rettberg; that inasmuch as the testimony affected all, there should have been an express consent of all before Bentley



could testify. That presents a question of fact. Taking the evidence as it stands in the record, we think the express consent of Rettberg was sufficient to authorize the court to permit Bentley to testify.

The next question made is that Rettberg not being a party, what Bentley testified could not bind Joseph Stoppel. But it is to be borne in mind that this property that Joseph Stoppel was claiming, was first transferred by A. A. Stoppel to Rettberg, and by Rettberg to Joseph Stoppel. The plaintiffs allege that that was a fraudulent transaction. Rettberg had testified to the entire transaction. All that was inquired of Bentley was as to the statement made \*to him by Rettberg. The effect of Bentley's testimony was to 253 contradict Rettberg as to what was said and done and as to the object of doing what was done. We think it was clearly competent.

The only other question made in the case is this: On the trial of the case, and after the jury had retired, the bailiff went to the jury-room. What he did appears from the bailiff's own affidavit. He says that he was the bailiff and had charge of the room in which the case was tried; that the court could not do anything while the jury was out—was waiting for the jury—and that seeing that state of things he took it upon himself to go to the jury-room, and this is what he says he did: "When this affiant, to facilitate the business of this court, went several times to the jury in their room and into said jury room and told the jury to hurry up, and that the court wanted them to proceed with its own business, and told the jury that the court was waiting for them."

Now, this bailiff must have been a man of considerable forethought and some cheek. He must have had a very decided sense of the responsibilities of the court. It presents a serious question how far interference with a jury in their deliberations can be tolerated. When the case was first stated to us we felt inclined to set aside this verdict on the ground of this interference, fearing the influence of allowing the verdict to stand. But it will be observed that this case was tried before a very careful judge who had personal knowledge of all the facts that transpired. So far as appears from this affidavit the jury might have kicked this bailiff out of the room, just as they ought to have done, and gone on with their deliberations for a day and a half or two days. I don't know how that is. There is nothing in the case to show that the jury were influenced by this to cease from their deliberations, nothing to show that they immediately agreed upon a verdict; nothing to show that any prejudice resulted, or that they were influenced at all by it.

Waterman in his work, sanctioned by California case, states the rule to be this: that where the interference with the jury is not attended, with corruption in the latter, and has not been prompted by a party [and there is nothing here to show it was,] and it does not appear that any injustice has thereby been done [and there is nothing here to show that any injustice has been done,] the verdict will not be disturbed, whether the case be a civil, criminal or capital trial or other-

wise. Giving force and effect to this rule, which we are inclined to hold as the true rule, we are unable to see that prejudice resulted from this interference with the jury, and the judgment will be sustained.

Wilson & Sykora, for plaintiffs in error.

J. H. Webster and W. J. Boardman, for defendants in error.

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## \*HUSBAND AND WIFE—ATTACHMENT.

[Cuyahoga District Court, March Term, 1879.]

Rouse, Lemmon and Finnefrock, JJ.

†CHARLES A. CRUMB ET AL. V. JUSTINA TREIBER.

A married woman deposited a sum of money with C. & B., bankers, and thereafter in an action instituted by third parties against the husband alone an attachment was issued and process in garnishment served upon C. & B. and upon the wife. Pursuant to an order of the court in such action, the court finding that the deposit in the name of the wife was in fact a credit of the husband, C. & B. paid said sum into court. In an action subsequently brought by the wife to recover of C. & B. the amount of the deposit, *Held*, That such payment by C. & B. did not constitute a valid defense, she not having been a party to the previous action.—ED. LAW REPORTER.

LEMMON, J.

This was an action commenced in the court of common pleas by Justina Trieber against Charles A. Crumb and others, to recover money claimed to have been deposited by her with the defendants. The defendants filed an answer and amended answer to the petition. In the amended answer they set up first, that the plaintiff is a married woman and has no right to bring the action in her own name. Second, that previous to the commencement of the action a suit had been commenced by other parties against Charles Trieber, the husband of the plaintiff, in which a garnishee process was served upon the plaintiffs in error, and they were ordered by the court of common pleas to pay into court \$668.63, the money that they owed, as determined by the court of common pleas, to Charles Trieber, to be applied in payment of the claim of the plaintiffs in that action, and they claim that payment is a good defense to the action of Justina Trieber, the wife.

A reply is filed, the object of which is simply to set up that the plaintiff was not a party to the suit against Charles Trieber and in no way bound by its proceedings, and it denies all the allegations of the answer. The issue thus made presents the question whether the payment of money by a garnishee in pursuance of an order of the court constitutes a defense to a subsequent action by the real

† Affirmed by supreme court without report, and with penalty, 8, B. 222.

owner of the claim who was not a party to the attachment proceeding.

The first inquiry that seems to present itself to the mind is, what is this proceeding in attachment in Ohio under the present law? Is it a proceeding as the old statutory proceeding in this state was—*in rem*? The old method of proceeding in attachment in this state could only be commenced where the defendant was a non-resident upon whom service could not be had within the jurisdiction. We find a case in the second Ohio reports where it was assigned as error that the party was within the jurisdiction of the court and the proceeding was reversed. Notice by publication was required to be given and other parties were allowed to come in and prove their claims and share with the party suing out the attachment.

\*In proceedings in attachment now a petition is filed as in any other case, and the attachment issues upon the filing of the proper affidavit; but it amounts to nothing unless a judgment is obtained. It is a mere incident to the action.

Now such an action is in no wise an action *in rem*. It is an action against the person, where the persons are brought into court and a personal judgment is rendered—not a judgment as to any particular property.

We are asked to say in such a case that an order of the court that certain property was due to Charles Trieber in an action in which Justina Trieber was not a party was absolutely concluded by an order of the court.

It is said in argument that she was also garnisheed in this case. What of it? A garnishee process served upon her requiring her to answer whether she had any property of Charles Trieber in her possession or whether she owed him any debt did not raise any question as to whether this debt from Charles A. Crumb and others was due to her or not. No issue of that kind was raised. It is said there are authorities which sustain this position, and we are referred to a case in 4 Washington, 503, Mayer, admr. of Lewis Benner, v. Jacob Foulkrod et al., admr. of George Foulkrod. We have examined that case and will notice it briefly. The facts as stated in the pleadings in that case were these: John A. Holt by last will devised all his real estate to his wife during her life, after her decease the profits of the same to be enjoyed by a daughter during her life, and after her death the property to be sold by his executors and the proceeds to be divided in equal shares amongst the grand children of the testator then living except one who was to have two shares. The testator died in 1788; that the will was proved by the executors named; that the daughter died in 1808 and the widow in 1792; that at the time of the death of the widow and daughter the grandchildren living were, Mary C. Sheneck, who intermarried with Louis Benner, the plaintiff's intestate, Elizabeth Sheneck, who intermarried with John Darr, Michael Cooper, Adam Sheneck, Jacob Sheneck, Sophia Sheneck, who intermarried with Jacob Luntz, and

Barbara Sheneck, who intermarried with Michael Knurr. That on the 4th of April, 1809, George Foulkrod, the surviving executor, sold the real estate of the testator pursuant to his will, for the sum of \$12,000, which he received. In the years 1799 and 1801 Cooper, Adam and Jacob Sheneck severally assigned their shares of the estate of said Holt to Lewis Benner for a valuable consideration, and that previous to the bankruptcy of the said Benner, he agreed with Darr and his wife for the purchase of their share, for which he paid a part of the consideration. That by these transfers, and the purchases, the said Benner became entitled to five-eighths of the estate of said Holt, in addition to the share to which he was entitled in right of his wife. That George Foulkrod died in the year 1811, and the defendants are his administrators. The prayer of the bill is for an account and payment of the shares to which Benner was thus entitled. The answer admits all the material allegations in the bill, but alleges that after the assignments to Benner by Cooper and the two Shenecks, and the purchase from Darr, he (Benner) was duly declared a bankrupt under the bankrupt law of the United States, and the whole of his estate was assigned to A. Burt and J. C. Seton by virtue of which all his right to the estate of said Holt became rested in his assignees under the commission. That notwithstanding this Benner afterward assigned all the shares, as well as the one to which he was entitled in right of his wife, to Frederick and Henry Amerlong, merchants of New Orleans, who assigned the same to L. Krumbhaar, of Philadelphia, or by some instrument empowered him to receive the amount of said shares. That Burt and Seton as assignees commenced a suit in this court against Foulkrod in April, 1809, to recover the amount of the said shares, and on the 6th of November, in the same year, a verdict and judgment were rendered in their favor for the sum of \$7,072.25, including Darr's share. That Krumbhaar had full notice of these proceedings and acquiesced therein contending only for the share of Mrs. Benner. That for the purpose of obtaining the opinion of this court, whether he or the assignees were entitled to that share, an amicable suit was entered in the name of Krumbhaar v. Burt and Seton, and that the decision of the court was in favor of the plaintiff in that suit. The answer then alleges that the above judgments have been fully paid and satisfied and that the executor's accounts of George Foulkrod settled and passed by the orphans' court, and finally that the judgment obtained by the assignees of Benner under the commission is a bar to the present suit.

The court did so hold. That suit was decided and payment was made in accordance with it without objection. Then a second action was brought to recover the same matter. How it can be held that that is an authority that may be urged in support of the right of the defendants in this case to excuse themselves from payment because they paid in pursuance of a garnishee order where the party claiming against them was not a party, we are unable to see.

We are also cited to a case in Pennsylvania. But the proceed-

ing in attachment under the laws of Pennsylvania is a proceeding in the nature of a proceeding *in rem*; and we think the case is not an authority in this case. We are asked upon the authority of these cases, which appear to be wholly inapplicable to the present case, to decide that a person who is not a party to an action at law is still bound by the judgment and order of the court in such action. We think the authorities from the earliest periods have been otherwise. That it is against all the settled notions of members of the bar that practice in the state that a court could hold that an order upon a garnishee to pay over money could bind any persons who were not parties in that proceeding.

It is said it would be a hardship to require them to pay a second time. But the fact appears upon the argument that the case was commenced and was actually pending before they paid over that money. There was no necessity for them paying it over. They might have filed an answer in that proceeding setting up the fact of this garnishment and asking that the parties be brought in and required to litigate with Justina Trieber as to which was entitled to this money and thus protect themselves. They did not choose so to do, but rather to pay it over, and they did so at their own risk and must take the consequences.

The judgment of the court of common pleas must be affirmed with costs.

Hutchins & Campbell, for plaintiffs.

Safford & Safford, for defendants.

### \*HUSBAND AND WIFE—SLANDER.

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[Cuyahoga Common Pleas, May Term, 1879.]

ANDERSON ET AL. V. PACK ET AL.

1. A married woman cannot prosecute or defend by next friend, and her husband must be joined where she cannot sue alone.
2. It is not a misjoinder for husband and wife to join in an action for slander *per se* of the wife, as her reputation is his property as well as hers.
3. It is a misjoinder and demurrable to join two defendants alleging a joint speaking of slanderous words.

McMATH, J.

The plaintiffs say they are husband and wife and that their business is that of waiters and household work in the employ of the defendants, and they complain that the defendants spoke "the following words of and concerning one of the plaintiffs, to-wit, that she, meaning the plaintiff ——— Anderson, stole, took, and carried away some towels and pillow cases, and that ——— Anderson, meaning the plaintiff's husband, was concealing the same, meaning that the said ——— Anderson was a thief and her husband the re-

ceiver of stolen property, and that said words were uttered by the defendants and repeated by them at different times and with the express purpose of charging the said plaintiff as a thief and her husband as a receiver of stolen property, and that every one in whose hearing the words were used understood the same to mean a direct charge of stealing and receiving stolen property." They aver that those words are slanderous.

There is a demurrer to this petition on the ground that there is a misjoinder of plaintiffs. The court holds that a married woman cannot prosecute or defend by her next friend, but her husband must be joined with her unless the action concerns her personal property or is upon her written obligation, etc. (O. L., vol. 75, p. 606). The reputation of the wife is not her separate property. It is the property of the husband as well. There is not, therefore, a misjoinder of plaintiffs, and the demurrer is overruled as to that ground.

The next ground of demurrer is that separate causes of action against several defendants are improperly joined. The language of the petition is "the *defendants* spoke of and concerning —." Can such a thing take place? Observation would teach a man that two mouths cannot utter the same words with the same voice. Speech is but sound, a mere vibration of the atmosphere, cognizable only by the auditory sense. From its nature it necessarily follows that the *same* sound cannot be repeated; a *similar* or a *like* sound may be produced, undistinguishable in every respect from the first, and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word; he repeats a *like sound* of the same signification as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new, distinct, and separate publication; and while a man and wife are one, in some respects, they do not speak with one voice, but each for him or herself.

The demurrer is sustained.

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**\*MECHANIC'S LIEN.**

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

WILLIAM FILBERL V. F. O. DAVIS ET AL.

In order that a party may obtain a mechanic's lien on certain premises, the contract must be made with the owners, and if the lien states that the work was done under a contract with a person in possession of the premises, this would create no lien as against the owners, and this cannot be enlarged by averments in the petition that such person in possession was the agent of the owners, so as to be a contract of the owners.

TIBBALS, J.

The action in this case below was brought by the plaintiff in error to recover of Fanny O. Davis on an account for labor and materials furnished in the construction of a sewer and furnishing waterpipe for certain premises known as the New England hotel property. It is sought to subject that property to sale under a foreclosure of a mechanic's lien. It appears from the record that the land was owned by the heirs of Thomas Bolton, now represented by certain trustees; that a lease had been entered into by the decedent in his lifetime with one Willis; that that interest, however, had passed by sale to Beckwith who, it is averred, owned the real estate, while the defendant F. G. Baldwin has a lease for a term of years and is the owner of the building sought to be subjected. It is claimed that a mechanic's lien was perfected as against these parties so as to entitle the plaintiff to sell all these premises.

The errors assigned are (1) that the court erred in sustaining the motion to strike out a portion of the petition. It seems that the plaintiff ther. obtained leave to file an amended petition and did so. In view of that fact for the purposes of this hearing that will not count. (2) The court erred in sustaining the demurrer to the original petition. The same may be said of that. (3) The court erred in sustaining the motion to strike out portions of the amended petition of the plaintiff. As to that I will speak after referring to the other points. (4) The court erred in sustaining the demurrer to the amended petition. (5) Erred in giving judgment in favor of the defendant. Those two may be considered together. In his original petition the plaintiff sets up the facts I have indicated as to the ownership but recites that he furnished these materials and this labor under a contract with one Fanny O. Davis who was then in possession of the premises. In his amended petition he recites the facts more definitely, but still says he made the contract with Fanny O. Davis on behalf of the defendant Baldwin and with knowledge on the part of Beckwith, and seeks by that enlarged state of the facts to extend this affidavit by which he secured his lien so as to cover the interest of these other defendants. In his affidavit to secure his lien he recites that said labor was performed and said materials were furnished in good faith for the purpose of constructing a certain sewer and connections and plumbing to the building standing on lot of land hereinafter described, by virtue of a verbal contract between said William Filbert and said Fanny O. Davis in possession of said premises. That is the averment—that he made his contract with Fanny O. Davis in possession of the premises. It is claimed \*that from the ad-  
ditional facts set up that in point of fact Fanny O. Davis was  
the agent of these other parties and that her contract was binding upon the owners of the premises—upon Baldwin and upon the owner of the land.

Now, it occurs to us that this lien can only be created by virtue of the provisions of the statute relating to that subject. The party

must make his contract with the owner of the premises. If he does not he cannot secure a mechanic's lien. To say that he may cure a defect in his affidavit or that he may enlarge his contract by averments in a petition is simply to say a party may extend the terms of a contract by a pleading, making a contract that he never made. That the plaintiff had a contract with Fanny O. Davis to furnish these materials and this labor is unquestionably true, and as to her he may have a remedy; but he has no mechanic's lien upon the premises by virtue of a contract with Fanny O. Davis, simply a lessee in possession of those premises. We are also unable to see that this is a case where an equitable lien would arise. We therefore find no error in the record and the judgment is affirmed.

J. E. Ingersoll, for plaintiff in error.

McKinney & Caskey, for defendant in error.

### MARSHALING LIENS.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

CLARK, ADMX V. BENTHEM.

Where the owner of a tract mortgages the whole of it and then sells a part to B, who pays by assuming the mortgage and giving a mortgage on his lot for the balance, which latter mortgage the owner assigns to W, who claims that the balance of the tract should first be sold to pay the former mortgage; *Held*, that W, has only such rights as existed between B, and his grantor.

HALE, J.

This was an action to foreclose brought to foreclose a mortgage given by R. M. N. Taylor and his wife to Henry F. Clarke, and presents but a single question. The controversy here arises between Taylor and wife and a co-defendant Wright. Mrs. Taylor in 1870 owned four acres of land in East Cleveland. On the 15th of June of that year she executed a mortgage upon that land in connection with her husband to Jefferson Barr. On the 3d of October a second mortgage was executed upon the whole of the four acres to Henry F. Clarke;—two mortgages upon the four acres. July 20, 1872, Mrs. Taylor owning the fee in the land, an allotment was made of the land into various sublots. On the 6th of July, 1873, Taylor and wife conveyed subplot six in that allotment to John J. Benthem, the defendant. In that conveyance Benthem assumed the two mortgages, the one to Barr upon which there were \$4,000 due and the mortgage to Clarke on which there were \$712.50 due. The language of this agreement in the deed is specific and certain; the conveyance is made subject to the two mortgages which the grantee assumes and agrees to pay. The amount of purchase money which Benthem was to pay Taylor exceeded these two mort-



gages and to secure the payment of that purchase money Benthem executed a mortgage to Mrs. Taylor. That mortgage was assigned to the defendant Wright. Mrs. Taylor still owns a portion of the four acres, and the question made is between Wright and Mrs. Taylor as to the premises that shall be first sold to pay the Barr and Clarke mortgages. Wright insists that the land now owned by Mrs. Taylor shall be first sold to pay those old mortgages, leaving his claim to be made out of lot six. Mrs. Taylor insists that lot six shall be first sold, leaving Wright to get his pay out of what may remain after satisfying the Barr and Clarke mortgages.

Now, as between the Taylors and Benthem, it is very clear that Benthem became the principal and the Taylors sureties for the payment of those mortgages, fixing lot six as the primary source to which the party should look for his lien. Under that state of facts the mortgage on lot six was given. It is insisted that as the mortgage was originally given to the Taylors and by them assigned to Wright, that Wright gets some undefined privileges that the Taylors would not have. Suppose Bentley had made the mortgage upon the lot directly to Wright, would there be any doubt, as Benthem was bound, between himself and Mrs. Taylor, to pay those mortgages, that Wright would be remitted to the balance of the proceeds of lot six remaining after the payment of the prior mortgages, should there be any, for the payment of his mortgage? The assignment by Mrs. Taylor of the mortgage to Wright does not change the legal rights of the parties. The assignee stands in no more favorable position than did the assignor. Wright holds a third lien upon lot six and the order of the court is that lot six shall be first sold to pay those old mortgages, and if that fails to satisfy them the other lots may be sold. The decree will be accordingly.

G. E. and J. F. Herrick, for plaintiff in error.

C. D. Everett, for defendant in error.

## TAXES AND TAXATION.

[Cuyahoga Common Pleas, May Term, 1879.]

### GEORGE S. WRIGHT V. FRED W. PELTON, TREASURER.

Where a party has removed his residence to another county; *Held*, that the board of equalization could only take jurisdiction of such personal property as was situated in his former place of residence where it was at the time it was listed for taxation by the assessor, and any attempt of the board to add to such returns, made by the assessor, will be enjoined.

This was a proceeding to restrain the collection of a personal tax claimed to have been illegally assessed in June, 1877, by the board of equalization of the city of Cleveland, the plaintiff alleging that in March previous to the action of the board he abandoned his residence in the city of Cleveland and went with his family to Elyria,

Lorain county, to reside, and that he had no chattel property in Cuyahoga county subject to taxation. The court found that the plaintiff was a resident of Elyria, as claimed, but that after May 10th and at the time of the assessment by the board the plaintiff did have in Cleveland two iron safes worth \$80. No return was made of any chattel property of the plaintiff by any ward assessor. The entry upon the journal of the board of equalization was as follows: "9. George S. Wright—and we have information that he has refused or failed to list for several years—\$25,000."

Barber, J. *Held*, the plaintiff not being at the time a resident of the city of Cleveland, that the board of equalization "could only take jurisdiction of such personal property, money and effects, (of the plaintiff), as were situated in the city of Cleveland at the time they were listed for taxation by the assessor;" which was "at any time before the third Monday in May, in the year 1877, the 16;" and that the action of the board in entering \$25,000 for taxation was without authority and void. A perpetual injunction was granted.

A. T. Brewer, for plaintiff.

A. J. Marvin and J. F. Weh, for defendant.

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## \*DIVORCE—DOWER.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

FOOTE v. WORTHINGTON

Where a wife is divorced for the husband's aggression, and she receives a decree for alimony in money, to be in lieu of dower, which is decreed to be released, such discharge of dower does not cut her off from her right of dower in lands of the husband not given her as dower

HALE, J.

This case is an application for dower. The petition is in the ordinary form. The question raised is upon the answer. The answer alleges that the conveyance of the lands in which dower is sought was made by the husband in the year 1856; that in the following year the plaintiff made application for a divorce from her husband, which was granted at the May term of the court of common pleas of the same year by reason of the aggressions of the husband, and that the court awarded to her as alimony a certain lot, described as lot 16 on Detroit street in this city, and granted \*this  
275 further order: "It is further ordered, adjudged and decreed, that said plaintiff be forever barred of all right to any of the property of the said William L. Foote, real or personal, and that she shall be forever barred of all claim to dower in any lands which the said William L. Foote then was or at any time theretofore had been

seized and perpetually enjoined from instituting any proceeding in any court to obtain such dower." It is then alleged that the plaintiff, Mrs. Foote, after the rendition of this decree, entered into the possession of lot 16, allowed her as alimony, and has enjoyed the benefits of the same ever since the rendition of this decree, and that the decree was so entered with the consent of the plaintiff.

A demurrer is interposed to this answer, and raises the question as to whether the court exceeded its power under the statute in granting a decree that deprived the wife of the right of dower in the lands not allowed to her as alimony. It is claimed on behalf of the defendant that the plaintiff is estopped from claiming dower in those lands. The statute under which the court acted in this case is as follows: That where a divorce shall be granted by reason of the aggressions of the husband the wife shall be restored to all her lands, tenements, and hereditaments not previously disposed of, and she shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable." She shall have her own property free from any incumbrance by the husband, and the court, in its discretion, may allow her alimony out of her husband's property, real and personal.

Then the statute proceeds: "If the wife survive her husband she shall also be entitled to her right of dower in the real estate of her husband *not allowed to her as alimony* of which he was seized at any time during the coverture and to which she had not relinquished right of dower.

Now, what is the effect of this statute? It is to restore to her in case the dower is granted by reason of the aggressions of the husband all property right which she possessed, and give the court discretion to grant her alimony out of her husband's property, and then leave to her claim her dower estate in the lands of her husband; not allowed her as alimony in case she survived him. Manifestly when the court had gone to the extent of granting the divorce and decreeing her alimony it had gone as far as the statute contemplates the court should go, unless this decree, which attempted to cut her out of her dower in the lands of her husband and to perpetually enjoin her from bringing an action in any court to test that right and enforce it, is void by reason of the want of power on the part of the court to grant it. We regard the question as simply whether there was a lack of such power—whether the court exceeded its jurisdiction.

We have examined all the cases that have been referred to by the counsel for the defendant, and they establish the general doctrine of the effect to be given to decrees that are voidable but not void. But in this case before any application had been made for the divorce Foote conveyed away the lot in which the plaintiff now claims dower. He had parted with all the interest or right of property that he had in it at the time that decree was granted, and the court undertook by the decree to say that she should be cut off from dower in the property not then owned by him which he had con-

veyed away, and to enjoin her from making any application for the right of dower. It does not appear from the decree that it was rendered in pursuance of any agreement made upon the part of the plaintiff by which she took lot 16 as an equivalent to her dower rights. So far as the decree shows the court was only acting in pursuance of that clause of the statute that authorized and required that alimony should be granted out of her husband's estate; and that same statute explicitly declares that in case she shall survive her husband she shall be entitled to dower in the lands of her husband.

Now, we are inclined to think that so far as this decree undertook to settle the right of the wife to dower, a contingent interest that she then had that by the death of the husband ripened into a title—that so far as it undertook to cut her out from the rights which she had it was wholly void and inoperative. Nothing is alleged in the answer showing that she should be estopped by that decree—no agreement or circumstance alleged that shows that she got any equivalent for that right. We are inclined to think that the court below was right in sustaining the demurrer to the answer and in holding that the decree, so far as it undertook to cut her out from her right of dower in the lands of the husband not given her as alimony, was void.

Eddy & Gaylord, for plaintiff in error.

Ingersoll & Williamson, for defendant in error.

### IMPEACHMENT OF WITNESSES.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

WILLIAM BROWN V. SAMUEL HUNKIN.

Where a defendant is questioned as to collateral matters, his answers are binding, and contradiction is not allowed, because it injures the credibility of the rest of defendant's testimony.

TIBBALS, J.

Hunkin brought an action against Brown in the court below on a breach of contract of warranty of soundness in the sale of a horse. The fact of the warranty seems to have been conceded upon the trial; the issue being confined to the question of the soundness of the horse at the time of the sale. The defendant testified to the soundness of the horse. On cross-examination counsel for the plaintiff asked a number of questions which were objected to—the objections overruled and exceptions were taken, and he was required to answer. The witness was asked by plaintiff's counsel why he had subpoenaed one H. L. Stanton as a witness for him. This question was objected to and the objection overruled. The witness answered, "I subpoenaed him to testify to certain facts which Stan-

ton told me last winter he knew about this case." Another question, "Did you not subpoena Stanton to testify that this horse was injured by the plaintiff when crossing a railroad track?" The same objection and ruling was made as to this question. The answer was, "Mr. Stanton told me last winter that Mr. Hunkin had said to him that this horse had had his leg wrenched or strained while he, Hunkin, was driving him across a railroad track, and I subpoenaed him for that purpose." Q. "Did you not threaten Stanton with prosecution or attempt to bulldoze him when he refused to testify?" The objection to this question is to its substance, not to the language, and was overruled. The witness answered "No sir." Thereupon he rested.

Now, as to this, if this were the only trouble we should say that in the latitude allowed in the cross-examination of a party, it is possible that the court in its sound discretion could permit this party to be interrogated as to why he subpoenaed that witness and had him in court with the view to test the fairness and good faith of the party to the transaction in the trial of the case. We were inclined to hold that this was not an abuse of that discretion. But the defendant having rested his case, the plaintiff in rebuttal called the witness, H. L. Stanton, and he was asked, "What did the defendant subpoena you in this case for?" Objection was made to the question, the objection overruled and exception taken. The witness answered, "He expected me to testify that the plaintiff injured the horse in crossing a railroad track." Q. "Did you ever tell the defendant, Brown, that Mr. Hunkin, the plaintiff, had told you that this horse had his leg wrenched or strained while he, Hunkin, was driving him across a railroad track—did Hunkin ever state any such thing to you?" This was objected to, objection overruled and exception taken. The answer was, "He did not."

We have examined this case with a good deal of care and have been anxious to sustain this judgment, for aside from this, the case seems to have been very fairly submitted to the jury, and the jury found in favor of the plaintiff.

But on what principle can this evidence be admitted? Grant that this collateral matter was properly inquired into, was not the party making the inquiry, under the very well settled rule, bound by the answer that he got? Had he a right to put a witness upon the stand to contradict the testimony he had himself called out? \*It certainly had no relevancy to the case. If it was true that the plaintiff had so stated to Stanton, the latter was the proper one to testify to it. To contradict the witness in this manner is simply introducing another method of impeaching a witness, and it is a method that is not only not known to the law but is expressly forbidden by it. We sought to ascertain if we could not sustain the judgment by saying that the party was not prejudiced, but how can that be said when the defendant, whose evidence was evidently very material for himself in the issue, by this process was completely contradicted by a disinterested witness, the holding that the evidence

was admissible, the jury would be justified in treating the evidence as seriously injurious to the defendant.

We must therefore reverse the judgment on the ground of the wrongful admission of that evidence.

Thomas J. Carran, for plaintiff.

W. S. Kerruish, for defendant.

### CONTRACT—CUSTOM AND USAGE.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

JOHN BLETSCH v. STEWART ROBINSON.

1. A contract to furnish a certain number of merchantable barrel staves on the cars, at the rate of a car a week, at a specified price per 1000; *Held*, that such a contract is not an entire but a separate contract, and recovery for part may be had, the nondelivery of the rest was owing to his delinquency. The fact that the number of staves in a car be not specified, and though defendant did not refuse cars having culls in, but returned the culls, does not prevent the contract being separable.
2. A charge by the court to the jury that the contract sued on must have been made with reference to an uniform, notorious, and reasonable usage, renders immaterial a refusal to add a charge that the party must have been aware of such usage.

TIBBALS, J.

The errors complained of in this case are to the charge of the court. To understand the points made we will state the facts in the case. The plaintiff, Robinson, brought an action against Bletsch in the court below and in his petition alleged that he was a dealer in and manufacturer of staves and headings for barrels; that defendant, Bletsch was a dealer in and manufacturer of barrels in the city of Cleveland; that on or about July 7, 1874, the plaintiff had on hand and was manufacturing for the market, staves at Ansonia, Darke county, Ohio; that William Beaser, who was then and there a broker and dealer in staves and heading at Cleveland and in that capacity was acting as the agent of the plaintiff, and that as such agent, although in his own name, Beaser on the day referred to sold to the defendant one hundred thousand green bucked and ended oil barrel staves, and twenty-five thousand green sawed headings, at and for the price of \$32.50 per thousand. They were to be good merchantable staves and headings to be delivered on board the cars at Ansonia at the rate of one car per week from February 15, 1874, until all were delivered, to be paid for on delivery. The plaintiff says he was willing and ready at all times to perform the contract on his part, and that the defendant on receiving and paying for 6,260 of the staves and headings requested that the further delivery be postponed for awhile, which postponement was agreed to by the parties; and was for such a time that the entire time for the delivery of such

quantity would have expired at the rate of one car-load per week; that the plaintiff during that time had the staves and headings ready for delivery but was compelled to stack them near the depot at Ansonia, and that afterwards, on September 24th of the same year, the defendant entered into a new contract or arrangement with the plaintiff which was in the nature of an addition to the contract originally made, by which it was agreed that having received under the former contract 6,260 staves and headings and paid for the same, and that the remainder of the staves and headings were ready to be delivered at Ansonia as per contract, it was then agreed by way of compromise that Bletsch would at once commence receiving the balance of the staves at the rate of one car-load per week, beginning with that week, the same to be loaded on the cars in their then present condition, as prepared and stacked at Ansonia, to be delivered and paid for under the terms and conditions of the original contract. They then recite that in case of failure to receive them according to the terms of the new contract that it should be void, and a right of action should accrue to the plaintiff under the original contract. They further stipulate again that they were to be merchantable staves. After entering into that agreement the plaintiff delivered 6,510 more staves and headings on the 1st of October, 1874, and it is alleged that the defendant failed to pay \$35.14, part of the contract price thereof, and refused to receive and pay for any more of the staves and headings and refused to complete the contract and arrangement, or any part thereof, whereby the plaintiff's right to sue on the original contract accrued, and he brings suit for the balance due upon that car-load. The plaintiff further recites that the price had declined from \$32.50 to \$20 per thousand at Ansonia, and he seeks to recover for the breach of that contract the sum of \$1,389.

The defendant in his answer takes issue upon several matters, but does not as to the entering into of these two contracts. He admits the execution of the first and the receiving of the first carload and paying for it, the extension of time, the agreement to receive the balance in the same way, one car-load per week, and he says that car-load was delivered to him; but he denies they were merchantable staves, says they were composed largely of culls; that he was put to great expense in counting them and carting them and paying freight upon them, and he denies that the plaintiff is entitled to recover by reason of any breach of contract because of the defective quality of the remainder of the staves to be delivered, and of those delivered in the second car-load, and by way of counter-claim asks that he be repaid the expense he has been subjected to by reason of the staves and headings being of an inferior quality.

The case was tried to a jury and the question was as to the character of the materials to be furnished under the contract—whether there had been a breach of the contract on the part of the plaintiff in not furnishing the proper staves under the contract, or whether there was a breach of the contract on the part of the defendant in improperly refusing to pay for the staves he had

received, and in refusing to receive those not yet delivered but ready to be delivered. Upon those questions of fact arose a very important legal question, and that was whether this contract was a separable contract or an entire one. It was claimed on the part of the plaintiff in error that it was an entire contract, and that the plaintiff having failed to comply with the contract by the shipment of merchantable staves, having shipped culls in lieu thereof, and having been subjected to the expense of returning them and paying freight, that he was under no obligation to pay for the second carload or to receive the others. While on the other hand it is claimed that this is a distinct and separable contract, each carload to be paid for on delivery, being a separate contract in itself. Upon that subject the court below charged expressly that it was a separable contract, and in case the jury found with the plaintiff upon this question of fact he would be entitled to recover. To that charge exception was taken and that is one of the material questions in the case.

The case of Loomis, Campbell & Co. v. The Eagle Bank of Rochester, 10 O. S., p. 328, has been cited and relied upon by the defendant in error as decisive of this case. The agreement in that case was as follows: "We have this day sold Loomis, Campbell & Co., 1,000 kegs (25  
283 \*pounds net) of good merchantable blasting powder at \$2.30 per keg delivered on board boat at Rochester. Their note at six months from shipment payable in New York City. Half delivered now and balance in June. Signed, E. Gilbert & Co." In that case they shipped the first half. The parties returned the note, and afterwards suit was brought upon the note and they declined to ship the other 500 kegs. It was claimed that was an entire contract, and that they might recover their damages for this breach. The court held that the stipulations as to the two lots of powder were to be treated as distinct, several agreements, and not as one entire contract, and that a claim for damages for the non-delivery of the last lot could not be set up as a counter-claim to an action upon a note given for the first lot brought by the indorser for value and before maturity, even though he had notice of a breach of the second contract at the time of his purchase. The court in passing upon that question say: "The paper, however," (speaking of the contract), "does not stop here, but proceeds to state *how* and *when* the payments are to be made, from which it appears that the vendees were to give their notes for each shipment as soon as it was made; and the notes, it seems, from the one in suit, were also to be negotiable."

The *mode* of payment then was to be by negotiable note and the *time* of payment immediately upon the shipment of each parcel. The fact that a note was given makes it different from the present case, but not in any material point. "Can it be supposed to have been the intention of the parties to the agreement that after each negotiable note was given, the maker was to maintain a lien upon



it for the performance of the other stipulations? We think not. The agreement to ship both lots is written, it is true, upon the paper, unitedly the two lots make up the aggregation of 1,000 kegs, bargained and sold, but in all the essential elements of a contract they are as distinct as if written upon separate slips of paper. It provides a different time for delivery and for payment, and a severable rate of compensation for each lot. No part of the price of the first lot is to be retained, or in any way made dependent upon the shipment of the second."

Now, it is claimed that case differs from this because there was a definite amount to be delivered and paid for—five hundred kegs of powder.

The 16th Wisconsin has also been cited upon this subject, which holds that a contract for the sale of wheat, at a stipulated price per bushel, is entire if the parties understand the delivery of the whole quantity to be a condition precedent to the payment of any part of the price, and such a contract is apportionable if the parties contemplate a delivery in parcels, and that payment should keep pace with the delivery. Where the contract is apportionable, the vendee becomes indebted to the vendor for each portion as soon as it is delivered and accepted without regard to any future breach or non-performance of the contract on the part of the vendor. Now, that was simply a contract for the delivery of one thousand bushels of wheat at a fixed price per bushel to be paid for upon delivery.

The argument against this contract being separable, is founded upon the fact, it is claimed, that there is no distinct quantity to be delivered and paid for. It is true the contract says that it is a car-load, but it is claimed it does not show how many shall be a car-load. It requires counting and culling to determine that. But would not the same principle apply to this case of the wheat—you would have to ascertain the number of bushels. It is true it may be more easily ascertained than you may count staves, but that does not determine the question of the correctness of the legal proposition. In that case if the wheat was defective, and not in compliance with the contract, the party would be under no obligation to receive it, and would have the right to refuse it entirely, or to pay for what he did receive and return the other. We have been cited to a case in the 5th Metcalf by counsel for the plaintiff in error as bearing upon the question, which was this: A party sold a cargo of grain to be delivered in bulk and paid for upon the delivery of the entire cargo. It will be seen at a glance that that is no such case as either the Wisconsin case, the Ohio case, or the one at bar. It is an entire contract, of course. No payment could have been required or demanded until the entire cargo was delivered. It is not a case parallel to the present one at all.

Now, what is the difficulty in determining this matter as to the staves? All it requires is simply that you count the staves. It would be presumed that the contract would be complied with and

that none but merchantable staves would be shipped. If that were so, then no culling would be required at all—simply counting—precisely as you would count kegs of powder; precisely as you would measure bushels of wheat to determine the amount of money to be paid. So in this case you ascertain the number of thousands of staves upon each car-load, and payment for the number shipped is absolutely required under the terms of the contract. The fact that there were culls is a matter that does not at all affect the question, for while, doubtless, the party has a right to refuse to receive a car-load that had culls if he chose, yet, if he continued to receive them and put himself to the trouble of culling the staves and returning the culls he ought not be heard to say it is an entire contract. We hold, therefore, that each car-load forms a several contract in itself, to be received by itself, the quantity to be determined and paid for upon that basis.

Another assignment of error is to the charge that the plaintiff was bound to put the staves on the cars as they were stacked in his yard. It is difficult to see what error there could be in that. From the original contract it may be inferred that the plaintiff was getting out the staves and heading for delivery, and in the second contract it was distinctly recited between the parties to the contract that the staves and headings were then in the yard stacked at Ansonia ready for delivery, and the defendant bound himself to receive those identical staves and headings on board the cars at Ansonia in that second agreement. What error can there be then in that charge? It is true he says they were to be merchantable, and that he says they were not merchantable. That does not affect the question at all. Presumably, the plaintiff should have delivered merchantable staves. If what he did deliver were otherwise, the other party might refuse to receive them, or he might receive and pay for what were merchantable and return the culls. We think there is no error in that charge.

Defendant also excepted to the refusal of the court to charge as requested. There was but one refusal and hence it follows that that is specifically excepted to. That was on the subject of the usage prevailing in reference to this subject matter in the city of Cleveland. To make the point intelligible we will have to read the other requests: 1. "That the point of delivery was at Ansonia, Darke county, Ohio, and that being the point of delivery, the plaintiff was bound to deliver at that point or place upon the cars only merchantable staves."

2. "That unless the jury find from \*the evidence that a uniform, notorious and reasonable usage existed in Cleveland, making it incumbent on the defendant to cull staves in Cleveland under the kind of contract on which this action was brought, the defendant was not bound to receive any car-load of staves that were not merchantable as a whole."

3. "That if the jury find such custom existed, they must also find that this contract was made with reference to it, and with the

understanding that the contract was to be interpreted thereby. All and each of such propositions and statements of law were charged by the court as requested.

4. "That if the jury find such custom existed they must also find that the defendant was aware of its existence when he made this contract before he would be charged with any violation of this contract as interpreted by this custom"—which the court refused.

Now, what was the necessity of this last charge of the court, after they had already, at the instance of the defendant, charged the jury that to make that custom and usage binding upon the defendant it must have been a part of the contract itself, and the contract must have been entered into with reference to it and to be interpreted thereby? Why add that he must be aware of it? The court might properly say, "I have already said to the jury they must find knowledge on the part of the defendant of the existence of the custom before he could enter into a contract with reference to it."

Another reason which is entirely conclusive upon the point: The defendant as shown by the pleadings and by the record, had the entire benefit of this custom or usage at Cleveland where the staves were received. He says that he had the right to compel the party to receive back the culls and he claims the right to recover the expenses of culling and cartage and the amount of freight he had paid. The defendant had the benefit of that to the jury. It is wholly immaterial whether he had any knowledge of the custom or not. He had the benefit of everything that could possibly grow out of it in the case, and could in no way have been prejudiced by it.

There was therefore no error committed on the trial of this case and the judgment is affirmed.

Foran & Hossack, for plaintiff in error.

Estep & Squire, for defendant in error.

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### \*BUILDING CONTRACT—TRIAL.

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Cuyahoga District Court, March Term, 1879.

[Watson, Hale and Tibbals, JJ.]

†SIMEON C. KANE v. THE WILSON & HUGHES STONE CO.

1. In an action on a building contract for the contract price, recovery may be had on a *quantum meruit*, where the work has not been done strictly according to the contract, but substantially so, the omissions and variations being slight.
2. The admissions of testimony in rebuttal which would properly have been evidence in chief, is not ground of reversal.

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†Affirmed by Supreme Court. 39 O. S. 1.

WATSON J.

The action below was brought by the Wilson & Hughes Stone Company against Kane to recover upon a claim which had been assigned to the plaintiff by a man by the name of Scott, the claim arising out of a contract between Scott and the defendant Kane by which Scott had agreed to furnish, dress and lay in the wall all the stone needed for the erection of a certain building in this city, known as Windsor block. The petition alleges that Scott had been paid all of the contract price except a part of the last payment which fell due October 1st, 1875—the sum of \$600.

The answer denies that the terms of the contract between Scott and the defendant are correctly stated in the petition or that they were complied with by Scott, or that the last payment under the contract ever became payable.

By way of set-off and counter-claim the defendant avers in his answer that the Wilson & Hughes stone company, in consideration of the assignment of the claim to it, assumed all the liabilities of Scott to the defendant, and that by the terms of the contract mentioned in the petition Scott agreed to furnish for the building "clear Amherst stone free from spots and discolorations." That afterwards the provision as to Amherst stone was modified so as to allow stone to be furnished from the Ohio stone company, likewise to be "free from iron and all spots or discolorations," and it is averred that Scott did not comply with this provision of the contract thus modified, but furnished stone from the quarry of the plaintiff, the Wilson & Hughes stone company, which was badly spotted and discolored, rendering the building unsightly and much less valuable than it would have been had Scott complied with the contract.

The defendant further alleges that Scott was guilty of repeated and unnecessary delay, delaying the work two months, whereby the defendant, being liable therefore to the owner of the building, was damaged in the sum of \$3,000. The defendant avers a breach of contract by Scott also in respect to pointing up and cleaning down the stone work after it had been laid, and asks a judgment against the plaintiff for the sum of \$3,600.

The case went to trial and resulted in a verdict and judgment in favor of the plaintiff for the amount claimed by it, and is now in this court for review. A number of errors are assigned in the record. The first is: The court erred in admitting evidence offered on the trial by the defendant in error.

The plaintiff in rebuttal put to various witnesses questions relating to the character of the stone—as to whether the stone was spotted or discolored, thereby to contradict the testimony of the defendant's witnesses to the effect that the stone were in fact spotted and discolored. These questions were objected to, the objection overruled, the defendant excepted, and the witnesses answered in substance that there were none or they observed none.

The judge trying the case said it was proper rebutting evidence and it occurs to us that it was within the proper range of the discretion of the court to admit it then even, if it were properly evidence in chief. We regard it as evidence that might be given in chief, though not necessary to be given in chief. It was evidence that related to the defense. It was called out on the defense. They were specific questions for the purpose of explaining or modifying the effect to be given to the evidence that had been given in the case by the other party. We see no reason why it should not have been admitted upon an application to the court as a matter of discretion, and it will not do to say that, because the court assigned an improper reason for admitting the evidence, an error had been committed.

The third assignment of error is that the court erred in its charge to the jury. We have searched the charge for we had supposed that therein was the real question in the case. While we recognize the fact that there are legitimate questions in that we have not been able to agree with counsel that the court erred. The defendant first asked the court to charge: Plaintiff having, in its pleadings, based its right to recover exclusively on contract, and on having carried out the contract, can only recover on proving to your satisfaction, that Scott did the work according to his contract, and cannot in this action recover for work performed not according to contract." This charge the court refused to give and the defendant excepted.

The defendant also asked the court to charge the jury: "The parties having agreed that the work should be done to the satisfaction and acceptance of Blythe, the architect, then Blythe's opinion, formed in good faith, is binding on the parties, and if in good faith Blythe was not satisfied with the work, and has not accepted it, and was of the opinion that the building was not completed, then plaintiff cannot recover for the \*\$600, which it avers was only payable on completion of the work." This was refused. But the court did charge upon the 291 subject of these requests, as follows: "In contracts where the materials are subject to the inspection and acceptance of any particular persons, that inspection and acceptance is conclusive, unless there is some fraud or concealment practiced by the person furnishing the materials. If these stone were fairly and honestly exposed to the view of the architect, and he, after such inspection, permitted the stone to go in without objection, and there was no defect in the stone known to Scott, or which by careful inspection he could not discover, and such stone were accepted by the architect without objection, the architect could not wait until after the building is completed, and then object to a particular stone which had passed his inspection. But if Scott put in stone which the architect had rejected, and thus deceived the architect, Scott would be liable unless Kane knew that such stone had been used after being rejected. If Kane knew it or connived at it, then there is no lia-

bility of Scott to Kane on account of it, although Kane might be liable to Otis. If imperfect stone went into that building with the assent or without objection on the part of Kane, Kane knowing at the time that they were defective, no claim for damage can be sustained by Kane on account of defects in the stone of which Kane had knowledge, even though he may be liable in damages to Mr. Otis on account thereof." To this charge the defendant excepted.

Now, we are unable to see any error in that. We regard this as a cautious charge—a charge appropriate and in very guarded language. We can see no reason for disturbing the judgment in this case on account of anything that is said in it.

The court, among other things, after charging the jury that the defendant had withdrawn his claim for an affirmative judgment, that they must first find that plaintiff was a corporation, that Scott had assigned his rights to plaintiff and what was the contract between Scott and Kane, charged the "jury that they must, to enable plaintiff to recover, find that Scott substantially complied with the contract. But this is not a technical rule; it does not apply to immaterial points, but to the substantial requirements of the contracts. If the work was substantially completed then the plaintiff is entitled to recover so much as the materials were reasonably worth after deducting all damages which Kane sustained by reason of defects in the materials or work and for which Kane would be liable to Otis."

On this part of the charge is based another of the principal objections to this judgment or ruling of the court below. The court charged if the work done and the materials furnished were not in accordance with the contract, that the plaintiff could recover so much as the work and materials were worth. We understand the rule to be laid down in the 7th of Pickering, and which is approved in the 26th of Ohio by our own supreme court and adopted as law, that when work has not been done strictly in accordance with the contract—all the materials may not be strictly in accordance with the contract—where there may be some very small omission in finishing up—that in all cases of that class the party may recover the value of the work and material, less the difference of value between the way in which it is done and what it would be if done strictly in accordance with the contract. But to that the court should probably have added that in finding out the value of the work the jury should take into consideration the contract price. By adopting the rule in reaching the value of the work the defendant is entitled to the benefit of his contract if he has got a contract. In estimating the value of the work he has done, he ought to have the benefit of it. Although this does not appear in this charge yet we think we are bound to presume that it was given by the court. This record does not purport to set out everything the judge said in his charge. It says, "it was said among other things." There is no error in the charge as given as far as it goes. We feel that we are bound to presume that the court

below did make all the proper and necessary explanations of the law as laid down in the charge. If the party had found that this was omitted and he relied upon it as error, he could very easily have availed himself of it by asking the court to add to the charge that the jury must, in estimating the value of that work take into consideration the contract price at which the work was to be done. If that had been done and the court had refused to give it then it would be apparent upon its face that there was error in the charge. But that not having been demanded, and this charge being "among other things"—it not appearing that it was not given, we cannot presume that that explanation was not given, and for that reverse this judgment. We are not authorized by the law to that.

We, therefore, see no error in this case in the admission of evidence, in the charge or the rulings of the court in regard to the law of this case.

Mix, Noble & White, attorneys for plaintiff in error.

McKinney & Caskey, attorneys for defendant in error.

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### VENDOR AND PURCHASER.

[Cuyahoga Common Pleas, September Term, 1879.]

HIRAM H. LITTLE v. HENRY THOMAN ET AL.

Where the purchaser of the equity of redemption of property from a mortgagor does not assume the mortgage and sells the equity of redemption to defendant, who does assume and agree to pay such mortgage, the mortgagee may claim a personal judgment against him, for he received consideration for his promise.

HAMILTON, J.

The petition in this case contains two counts. The first count is founded upon a note and mortgage. In the second count it is sought to obtain a personal judgment against Joseph Stoppel, because it is said that while one Riblet owned the property, he sold the equity of redemption to Stoppel, and that Stoppel, in the deed which he took, assumed \*and promised to pay this note, upon 292 which suit is brought; and that he has failed to pay it. Stoppel files a demurrer to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action as against him.

It is claimed that the petition nowhere states that Riblet ever assumed to pay this note and mortgage; that it does not aver that he ever became liable in any way to pay this note, but simply avers that he became the owner of the equity of redemption at some time, and that while so the owner he sold that equity to Stoppel, and that Stoppel agreed to pay the holder of that note its amount. It does not anywhere appear, it is claimed, that there was any obli-

gation resting upon Riblet to pay this note at all, and that, therefore, there is no sort of privity between the parties. I do not think, however, there is anything in that objection. It seems to me that if a party receives a consideration from another, who is perhaps under no obligation to a third party at all, on account of which he assumes to pay the third party a certain amount of money, that third party may bring his suit and recover upon the strength of that promise. The promissor having received a consideration for his promise, we see no objection to the beneficiary bringing suit in his own name to enforce that promise.

But it is said here, there is no consideration named for the promise. Now, under the decision in the 14th O. S., the supreme court hold that where the equity of redemption is sold by name to a party, it is to be presumed in law that the party thus getting the equity of redemption assumes to protect the party selling the land, from any mortgage which may be on it, because they say, having bought the equity of redemption, he never could be benefited in any way by owning that equity of redemption, unless he took care of the mortgage upon the property, and that from the nature of the transaction a promise must be presumed. But we are not forced to such a state of things in this case, because it is expressly stated that he did promise in so many words to pay it, and the nature of the transaction, it seems to me, shows sufficient consideration for the promise. The demurrer will be overruled.

Ingersoll & Williamson, for plaintiff.

J. W. Heisley and Stone & Hussenmueller, for defendants.

### \*ASSIGNMENT FOR CREDITORS.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

LORD, BOWLER & CO. V. CHAFFEE.

A contract with a firm to put machinery in a factory in another town belonging to another and distinct firm, but having a partner common to both, cannot be the foundation of a preferred claim on the property of the former firm, in the hands of an assignee, nor can the assignee who paid it as a preferred claim, in ignorance of the facts, be estopped to claim repayment.

TIBBALS, J.

An action was brought by the defendant in error against the plaintiff in error in the court below upon substantially this state of facts: that the plaintiffs in error wrongfully presented a claim to him, as the assignee of J. D. Lyons & Co., which they supported by appropriate affidavits, making it a preferred claim—a mechanic's  
 298 \*lien—which he paid out of funds in his hands, and he averred that subsequently he ascertained that they had no such claim; that they had no claim against the assignors; that they



had no preferred claim—no mechanic's lien upon the property of his assignors; that he did not learn those facts until long after the payment, and for the reason that he paid it through mistake he sought to recover it back from the parties.

The defendants answered, admitting that they presented the claim as a preferred claim; claimed they had obtained a mechanic's lien upon the property of the assignors; that it was properly paid; that they had such a lien; that it was a preferred claim; that there was no mistake on the part of the assignee in paying it to them as a preferred claim. The case went to trial upon the issues thus joined. Considerable evidence was offered upon both sides. It appears that the firm of J. D. Lyon & Co. was composed at one time of three parties, and later of two parties; but during all the time they were known as the firm of J. D. Lyon & Co. It further appears that J. D. Lyon was a partner with one M. J. Hills under the firm name of Lyon & Hills; that the firm of J. D. Lyon & Co. were doing business largely in the northern part of Summit county in the manufacture of cheese, and that Lyon & Hills were engaged in the same business and had a factory at Earlville, Portage county. It appears further that J. D. Lyon, acting for the firm of J. D. Lyon & Co., purchased of Lord, Bowler & Co. an engine and other machinery for the cheese factory at Earlville, Portage county; that the property was bought under a contract with J. D. Lyon & Co.; that it was delivered to the cheese factory at Earlville then supposed to belong to J. D. Lyon & Co. Shortly after this sale to J. D. Lyon & Co. the firm failed—made an assignment to Chaffee. It was within four months after this sale that Lord, Bowler & Co. obtained their mechanic's lien upon the property at Earlville, making the proper affidavit to the account and filing it in the proper place; so that if J. D. Lyon & Co. had been the owners of the property in Earlville they would have had a valid mechanic's lien and preferred claim upon the property. The claim of the plaintiff was that as J. D. Lyon & Co. did not own the property—therefore Lord, Bowler & Co. could not get a lien upon it, and the assignee of J. D. Lyon & Co. was not obliged to regard it as a preferred claim and pay it as such.

It is assigned as error occurring at the trial that the court erred in ruling out evidence offered by the plaintiff in error. The evidence is as follows: [On direct examination of Bowler, one of the defendants below.] "Q.—What information did you obtain from Mr. Lyon or Mr. Hill in regard to the property?" This question was objected to, the objection sustained and exception taken. It is sufficient to say in respect to this question that it does not appear what was proposed to be proved by the answer of the witness. It was argued that Hill probably would have said that the property belonged to J. D. Lyon & Co. If there was any presumption about it it would be the other way. The record very fairly shows that they did not own that property. It could scarcely be presumed that he would testify to what was not the fact, and it might be ob-

jected further that it would not be competent for him even to state that fact. We think there was no error in that particular.

It is next said that the court erred in its charge of the law to the jury and the court erred in its refusal to charge certain requests.

None of the requests are attached to the bill of exceptions and that matter was waived. To the charge of the court the exceptions are specific. As to that part of the charge which states that the plaintiff claimed that the defendants were only general creditors. The court in stating the case said to the jury, "It is not denied, in fact it is assumed, that Lord, Bowler & Co. had a claim against the estate of which the plaintiff was the assignee, but the claim of the plaintiff is that they were only general creditors; that they were only entitled to be paid the same as other creditors."

Now, it is very true that in the petition it is denied that they had any claim at all, but the record is very clear that upon both sides it was assumed that they did have a valid claim against the firm of J. D. Lyon & Co., so that the court was right in stating the case to the jury as they treated it. It is the province of the court to state to the jury the issues. Of course, the court need not make new issues, but it was fairly within the province of the court to state that they had waived certain averments in the petition. There could not have been any error in that. The court said to the jury that if the plaintiff established the proposition that the money was paid by mistake, then the plaintiff was entitled to recover; but he was very clear in proceeding to state the other proposition incident to it and necessary to the establishment of that, such as the ownership of the property by this particular firm, and the presentation of the claim. If all of those facts were presented by the court to the jury in connection with the statement, that that was the real central point in the case—did the assignee pay that money by mistake?—if he did, says the court, then he ought to recover it back, if he did not he ought not to recover it back. But as a part of the proposition he proceeded to tell them all about the effect of this lien; how it could be created; how it must be established; how it must be shown,—all of those things necessary and incident to the establishment of that proposition.

Now, taking the charge as a whole, upon that subject we think the court was clearly right. It is not just to the court simply to take that one clause and exclude all acts explanatory of it and then say that was error.

The next part of the charge relates to what would give the defendant a mechanic's lien upon the Earlville property. The court in that connection said "a man who furnished machinery, or does work towards the erection and repair of a building of this kind—a cheese factory—if he does not go any further than that—a man who furnishes a boiler and does any work in connection with it upon a cheese factory of this kind under a contract with the owner, may have a mechanic's lien upon it within four months

from the time the contract was made. Now, they took the necessary steps within four months in order to entitle them to a lien. To determine the question that they did have a lien the lien must have been placed upon the property of this firm J. D. Lyon & Co., and it must have been under a contract with J. D. Lyon. It is said that Mr. Lyon was a member of two firms, and one firm owned this factory at Earlville, and another firm owned the factory at Northfield. \* \* \* Now, I say to you in order to make this a lien upon the property of J. D. Lyon & Co., if there were two separate firms composed of distinct individuals, their rights would be just as separate as though they had been two single individuals," and then proceeds to illustrate that matter.

Now, what objection can there be to that charge? It charges that in order to make it a lien the property \*must have been sold by contract to J. D. Lyon & Co., and be put upon the property of J. D. Lyon & Co. It is precisely the language of the statute. There can be no doubt but what that is the law. The court said that in order to make this a lien upon that property it must at that time have been owned by J. D. Lyon & Co. 299

Now, it was argued that if J. D. Lyon & Co. held themselves out as the owners of the Earlville property, that fact would authorize the parties selling the property to them under such representations to treat that as their property. That is a remarkable proposition. A man represents that he owns property that belongs to somebody else, and upon that representation property is sold to him and put upon the property thus represented to belong to him, and the seller, relying upon the misrepresentations of the purchaser, files a mechanic's lien, and thereby gets a lien upon property that does not belong to the purchaser.

The court would have been very far from right if it had given such a proposition to the jury. On the other hand the court was right in saying that if they trusted them without learning the facts it was their misfortune. The court in illustrating this matter simply say that if Lyon & Co. were the purchasers and the property belonged to another firm that would not authorize the seller to get a lien on the property of the other firm. The proposition is too clear for discussion.

Now as to that part of the charge of the court as to what constitutes a copartnership, and as to what would constitute a copartnership among themselves. In the first place, there was no question made but what J. D. Lyon & Co. was a distinct copartnership and that Lyon & Hill was a distinct copartnership, and we think the court clearly defined the relations of the parties to each other.

The court said in another part of the charge: "The argument in this case has taken a very wide range, and I say to you that the law as given to you by the court is to control you in your findings in this matter. If counsel have mistaken the issues, discussed questions before you which, in the opinion of the court, are

not pertinent to the issue at all they should be entirely neglected by the jury, and it is only for the jury to answer questions which the court has submitted to you."

I had always supposed it was the duty of the jury to follow the law as given them by the court as distinct from the law as claimed by counsel. The court very wisely said to the jury that that was their duty.

In regard to the third defense as to what was necessary for the plaintiff to do, the court charged that if there was a mistake it was the duty of the plaintiff, as soon as he discovered it, to notify the defendants of the fact and demand of them to return the money paid.

In regard to the second defense the court said that it constituted no defense even if the facts set up were true.

There can be no estoppel as against the assignee to recover the money back that belonged to the creditors of the firm of Lyon & Co. He had never taken possession of this property of Lyon & Hill; he had no control of it, and no right to control it. We think the court, therefore, was right in thus disposing of the second defense, that it really constituted no defense. The judgment is affirmed.

Marvin & Hart, for plaintiff in error; George H. Foster, for defendant in error.

### OFFICIAL BONDS—JUDGMENT—SURETIES.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

†WM. BACKUS ET AL. V. THE FIRE AND MARINE INS. CO.

1. In an action against a principal and sureties on an official bond, interest as well as principal on the amount of defalcation, may be included when the debt and interest do not exceed the penalty of the bond
2. In an action on the official bond of a delinquent agent, the defendant being in default the plaintiff's attorney may waive a jury and submit the case to the court to hear the account and assess the damages.
3. A judgment by default on an official bond, against all the defendants as principals, without stating therein which were sureties is not ground for reversal on error.
4. A new trial does not lie because judgment by default was taken through negligence of counsel.

HALE, J.

The action in this case below was upon a bond executed by William Backus as principal and L. Schlather and another as sureties. Backus was appointed agent of this insurance company in Cleveland on the 10th of February, 1875. The condition of the

†See 2 Cleve., 204, for common pleas decision.

bond was that he should keep a correct account of the moneys received by him belonging to the company and pay over the same to the company, and faithfully perform his duties as agent in accordance with the instructions given to him by the company through its proper officers.

The petition in the case was filed on the 6th day of July, 1878, alleging a default on the part of the agent—that he had collected prior to May, 1878, something over \$1,100 which he had neglected to pay over to the company, and a judgment was asked against the makers of the bond. A judgment was entered by default. The record shows that there was no answer filed; that the party plaintiff appeared; that the court took an account of the amount due and rendered a judgment.

The first error complained of is this: That the judgment was rendered against all as principals, whereas it should have been rendered against Backus as principal, and the others as sureties. A short answer to that is that it was held by the supreme court in the case of Kelly et al. v. Collins, 11th Ohio, 310, upon a statute the legal effect of which was precisely in accordance with the provisions of the code as they now exist, that a matter of that kind can not be taken advantage of on error. That case is squarely in point. The next error alleged is that a judgment was taken for a large sum, more than appeared to be due.

The petition in stating the cause of action gives the proper amount. The statement made by counsel in argument is hardly sufficient to disturb this verdict.

The other ground of complaint is this: That interest was added to the amount of the default without a demand upon the sureties. A case was cited to us in which it was distinctly held that interest could not be added, but in looking at that case we find that it was a case upon a bond, and a judgment was taken for the full penalty of the bond. The court held that interest could not be added on the penalty of the bond. That is not this case. Suppose this case was against Backus alone. The money was due from him to the company from the time he should have paid it over to the company. Now the amount of the default with the interest added to it, falls considerably short of the penalty of the bond. We think under our statute, under the condition of this bond, that the court properly added interest to the amount of money due.

The last ground of error is that the court took this account. The record shows that the defendant being in default the attorney for the plaintiff offered to waive a jury.

Without enlarging upon the statute its language certainly is very comprehensive, "may take an account, hear the proof and assess the damages." All we need to hold is that in a case of this kind where the action is upon a bond of this nature, the defendant being in default, the plaintiff appearing may waive a jury and submit the case to the court for the assessment of damages by the court without the intervention of a jury, and the party not appear-

ing cannot take advantage of that on error and ask that the case be reversed because of error in his not having a jury trial.

300 \*Those are all the errors that are complained of in this record, and we think we cannot, even though it may result in a hardship, disturb this verdict.

Hutchins & Campbell, for plaintiffs in error; Mix, Noble & White, for defendant in error.

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**\*HUSBAND AND WIFE—CONTRACT.**

[Cuyahoga Common Pleas, September Term, 1879.]

HENRY L. HILLS ET AL. V. R. H. LAMBERT ET AL.

No judgment can be recovered against a married woman on a contract with a real estate broker to pay a commission for the sale or exchange of her separate real estate.—ED. LAW REPORTER.

CADWELL, J.

In this case there is a demurrer by the defendant Amelia Lambert, to the amended petition. The petition alleges that the defendants, R. H. Lambert and Amelia Lambert, as husband and wife, entered into a contract with the plaintiffs, who aver that they are real estate brokers and agents, whereby it was agreed if the plaintiff should succeed in selling or exchanging property belonging to the wife for certain other property, that they would pay to the plaintiff the sum of two per cent. upon the value of the property sold and exchanged, (and that amount was \$5,000) and that the plaintiffs are entitled to recover from the defendant the sum of \$100, the two per cent. A personal judgment is asked. The petition contains the further allegation: "The plaintiffs further say that said obligation on the part of said defendant, Amelia Lambert, was incurred for the benefit of her separate estate and property, and for the improvement of the same; wherefore the plaintiffs pray for a judgment against the said Amelia Lambert for the sum of \$100 and interest," etc.

Prior to the law of 1866 no judgment could be obtained against a married woman upon a contract entered into by her. That statute gives the right to a married woman to make contracts for labor and materials for improving, repairing and cultivating her real estate; but it is not broad enough to embrace a contract with a real estate broker to sell or exchange her real estate. It cannot come under the head of improving real estate, hence no personal judgment can be rendered against her by any court, either justice or common pleas upon a contract of that kind. The plaintiff merely asks for a personal judgment, and there can be no other relief because there is no specific property described in the petition which is sought to be charged. The demurrer is sustained.

**PLEADINGS—ASSESSMENTS—PAYMENTS.**

[Cuyahoga Common Pleas, September Term, 1879.]

**PETER HIGGINS V. FREDERICK W. PELTON, TREASURER.**

1. In an action to recover back the payment of an assessment, an averment that the assessment is illegal and void is not demurrable as a legal conclusion, but is a fact to be objected to by motion for indefiniteness.
2. In an action to recover installments of an illegal and void assessment paid annually, such installments do not constitute separate causes of action, so as to be separately stated and numbered.
3. Paying under protest an illegal and void street assessment placed on the tax duplicate, is an involuntary payment.

**HAMILTON, J.**

The plaintiff brings his action to recover the amount of an assessment paid during the years 1876 and 1877 for widening St. Clair street, in this city, upon the ground that the assessment was illegal and void. The assessment was paid in several instalments, and they are all grouped together in the petition as one cause of action.

It is claimed on behalf of the defendant that the payment of each instalment constituted a separate cause of action, and a motion is made to require the plaintiff to separately state and number his causes of action.

On behalf of the plaintiff it is contended that there being but one assessment it is but one act—liken it to a contract for the sale of land, or anything else where the purchase price is payable in instalments, where instalments have fallen due that an action may be brought to recover upon the contract in a single count in the petition, whatever may be due. They also liken it to a note of hand, payable in instalments, and, when interest is payable annually—that it would be idle to say that these instalments and interest payable annually should be declared upon as separate and distinct causes of action, but that whatever is due upon the note ought to be sued for in one count in the petition.

It seems to the court that in analogy to contracts, where different payments are falling due at different times, and to a lease where rent is falling due at different times, that all may be included in one cause of action.

We are of the opinion that it would \*not be good practice to permit a party thus having a contract or lease with different instalments due at divers times to bring separate actions for each instalment; that it would be making unnecessary costs to the defendant. So in the case of this assessment, if the treasurer was suing for the different instalments due, we think that he should be required to put them in one action. We do not think any division of damages or of the action ought to be permitted. If then the

treasurer, if he was commencing an action for these assessments, should unite them in one cause of action, may not the other party who has paid the illegal assessments recover them back in one cause of action? The only answer that can be well made to that position, if any can be made, it seems to me, is upon the theory that the action against the treasurer is founded in tort. That every time he collects such a tax he commits a tortious act, and if he thus commits a tortious act is it any answer for him to say that he founds his authority for committing the separate and distinct tortious acts upon a common ground? It is certainly not a continuous trespass or tort, and therefore the acts, if tortious, it seems to me, would be separate and independent acts, the collection of each instalment resting upon its own foundation.

But can the act of the treasurer be regarded as tortious? I am aware that there are many authorities that hold that a treasurer who seizes property to pay a tax that is assessed without color of law is guilty of trespass. That, unquestionably, was the former holding in this state. At the same time it was held that if the law providing for the tax was valid, but the assessment was illegal because of some omission or irregularity on the part of those charged with making the assessment, and the duplicate is regular upon its face, that the treasurer should be protected, and that suit in such case should be brought against the parties who illegally assessed the tax or caused it to be done. The treasurer was protected in the same way that a sheriff or constable would be by the regularity of the process served by him.

It seems to the court that since the passage of the law of 1856 the character of the transaction has been changed, and that the treasurer may be sued in any case to recover an illegal tax paid, not only when he commits an actual trespass in its collection, but when the tax has simply irregularly gotten upon the books; that he stands as the representative of the parties making the assessment and is liable to a suit at law upon two conditions: (1) That the tax is illegal. (2) That he has collected it.

Under the terms of this statute we therefore think, there having been as the supreme court said, practically no relief for the taxpayer either in equity or at law prior to its passage, that it was the object of the legislature to furnish this remedy for the collection of an illegal tax, and the right of recovery does not depend upon the tortious character of the collection at all. Eliminating from it then by this process of reasoning, if we are correct in it, the character of tortiousness, we think it comes under the head of one transaction, and the action should be for the recovery of the instalments altogether as one cause of action. It is said that a demurrer might lie to some of these instalments. We think that objection is not well taken, as a demurrer will lie to so much of the petition as is shown upon the face of the petition to be barred by the statute of limitations. We are, therefore, of the opinion (and



have arrived at it with considerable hesitation) that no injustice will be done to these parties by permitting these actions to go forward in their present form without separately stating and numbering the causes of action, and that under the law they are not separate and distinct causes of action in the sense that they are required to be stated separately. The motions, therefore, in these cases will be overruled.

The argument in support of the demurrer in this case, as I understood it, proceeded upon the theory that the causes of action appear upon their face to be groundless for the reason that the payment of the tax was voluntary. If in any of the cases the question is made by special demurrer to any count, whether or not the statute of limitations has run against an assessment or part of an assessment, may be presented to me at some future time. But I proceed to examine the question upon the suggestion made that the petition contains such a state of facts as shown on its face that the assessments were made voluntarily. So far, therefore, as a decision will go in this case, upon that ground the entries may be made. Do these petitions show then that the causes of action cannot be maintained because the payments were voluntary? It is declared in the petition that the assessment was made at a certain time, was divided into instalments, and that these instalments were from time to time placed upon the duplicate, and that payments half-yearly were made from time to time upon these instalments as they were entered on to the duplicate. It is further averred in the petitions that these payments were made under the solemn protest of the parties paying to prevent their lands from being returned delinquent and sold. It is now said that that is not sufficient to make a protest, that it was necessary for the parties to wait until the half-yearly payment had been returned delinquent, sent back again to the auditor, again returned to the treasurer and the other half of the taxes returned delinquent and sent back to the auditor, then to the treasurer again, and then wait until the next year's instalments fall due and the lands are finally advertised, and the auditor ordered to sell;—that then payment may be made under protest and not until then; that if it is paid before, when there is no present danger of sale, it is not paid under protest; in other words, that a protest is not enough in all cases to make a payment involuntary. A good many authorities have been cited to that effect. Such undoubtedly was the rule of the common law, and perhaps the rule in this state prior to the passage of the act of 1856, but in the 27th O. S., this subject comes under review at great length by the court, and while the syllabus of that case, which we concede is what we are to be governed by, is not broad enough to include this question in its terms, yet we think from the reasoning of the court that it clearly appears that there are but two things necessary in order to maintain a right of action, to wit: that the tax is illegal and void, and that the collection has been made under and by virtue of process of law and authority vested in the treasurer by the law to col-

lect it. It is needless for me to examine at any considerable length all these authorities. We think that the clear holding of the court in that case, whatever might have been the law prior to that time is as we have stated, and unless the petition itself shows that the payments were voluntary, the taxes paid may be recovered back. We do not think, from the statements contained in the petition, that the payments were voluntary under the rule as laid down in that case. The demurrer, therefore, must be overruled.

In some of the petitions it is simply averred that these assessments are wholly illegal and void. It was claimed in the argument 307 on the demurrer \*that was an averment simply of a legal conclusion, and that the demurrer should be sustained for that reason. In other of the petitions the averment is that the assessments are illegal and void, and have been declared so by the supreme court of Ohio in an action wherein the present defendant was also defendant. But upon the single averment that they were illegal and void in their inception, it seems to the court that it is also an averment of a fact. Swan, in his Treatise upon Pleading, states, that if the averment is that by the mutual dealings between the parties, the mutual account, the defendant is indebted to the plaintiff that a demurrer will not lie; that although such an averment may be a conclusion from certain other facts, not represented, it is nevertheless an averment of a fact; that it has some of the elements of facts in it, and that a motion should be made to make it more definite and certain in that regard, instead of a demurrer. Holding these views of the case the demurrer, as to this point also, will be overruled.

Grannus & Griswold, attorneys for plaintiff; Heisley & Weh, for defendant.

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**\*PLEADINGS.**

[Cuyahoga Common Pleas, September Term, 1879.]

**SECOND NATIONAL BANK OF CLEVELAND V. MARBACH ET AL.**

A motion to strike out an entire defense as being redundant and irrelevant, where there are several, is bad, for such motion supposes there is something in the defenses, or in the action, that is good.

HAMILTON, J.

This is an action brought upon certain promissory notes secured by a mortgage. Certain defenses are interposed by the defendant Marbach, which are separately stated and numbered. It is said that the matter set up in some two or three of these defenses is not sufficient in law to constitute a defense to the cause of action set forth in the petition; that it is irrelevant and redundant matter, and a motion is made to strike out those defenses for that reason. We think that much of this matter is redundant and that the most,

if not all, of them are subject to demurrer. We think, however, the proper method to reach it is by demurrer. A motion to strike out redundant and irrelevant matter supposes that there is something in the defenses, or in the action that is good. If the purpose of the motion is to strike out the entire defense, it is taking the place of a demurrer, a practice that ought not to be permitted.

The motion will be overruled and leave given to demur.

B. R. Beavis, for plaintiff; A. Zehring, for defendant.

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### PLEADINGS.

[Cuyahoga Common Pleas, September Term, 1879.]

HARRIET L. MARTIN V. JOHN GARWOOD.

A petition to recover an amount for the use of certain furniture, meat, drink, candles, fire, attendance, chattels and other necessities, furnished defendant by plaintiff, is open to a motion to make more definite and certain.

HAMILTON, J.

This action was brought before a justice of the peace to recover the sum of \$15, and comes into this court on appeal. The cause of action is stated in the petition to be "for the use and occupation of certain furniture and for certain meat, drink, fire, candles, attendance, chattels and other necessities, which said plaintiff furnished to the defendant," for all of which the plaintiff says the defendant is indebted to her in the sum of \$15. A motion is made to make the petition more definite and certain by stating the kind of chattels, drinks and necessities. We think the defendant is entitled to know something about it.

Benjamin, for plaintiff; Schindler, for defendant.

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### SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.

[Cuyahoga Common Pleas, September Term, 1879.]

BOEST ET AL. V. DORAN.

A verbal proposition for the exchange of property, conditioned on certain modifications, and as a consequence plaintiff paid down money to bind the bargain, for which defendant gave a receipt; *Held*, that this receipt still leaves it necessary to prove by parol that defendant accepted the proposition, and therefore does not satisfy the requirements of the statute of frauds.

HAMILTON, J.

The action in this case is brought for the purpose of enforcing the specific performance of a contract for the exchange of real

estate. The plaintiffs say that at a certain date they were possessed of certain lands in Michigan; that the defendant was the owner and was possessed of a certain house and lot on Taylor street, in the city of Cleveland, which he had put into the hands of a real estate agent for sale or exchange, which agent on behalf of the defendant made a proposition to the plaintiff specifying the terms upon which he would exchange the same for lands of the plaintiff located in Michigan. That subsequently the plaintiff wrote a letter in reply to that proposition accepting it, provided certain modifications were made in the contract. It is said that these modifications were subsequently accepted by the plaintiff, and that the plaintiff further required that some money be paid down to bind the bargain, to wit: the sum of ten dollars, and he says in his receipt, "Received of E. E. Boest ten dollars as part purchase money on house and lot No. 191 Taylor street, as per agreement," signed by said Doran.

It is claimed that the signing of this receipt by Doran, together with the former correspondence between the parties, makes a contract in writing so as to take it out of the statute of frauds. A demurrer is filed to this petition on the grounds that the contract is within the statute of frauds. The transaction was simply this: A proposition was made by one party to the other which was not accepted. He wrote back that he would accept certain other terms. It is said that was accepted, and that subsequently he took ten dollars in money on that bargain and gave a receipt. The receipt  
 314 \*referred to it as a part of the purchase price of the house and lot as per agreement. The agreement referred to must be the last proposition coming from the defendant, which he says he accepted. It does not appear that this acceptance of this proposition was in writing, unless it can be said having signed this receipt for ten dollars, it is an acceptance in writing. We think that this leaves the agreement to be established by verbal testimony, to wit: that he accepted the proposition. We think that this acceptance should be averred to have been in writing otherwise we do not find anything in writing to bind this party. Taking the whole petition together we think the demurrer should be sustained.

Estep & Squire, for plaintiff; Foran & Williams, for defendant.

## OFFICIAL BONDS.

[Cuyahoga Common Pleas, September Term, 1879.]

STATE OF OHIO, v. DAVID R. WATSON ET AL.

A bond made without naming any obligee, is void, and in an action to recover the penalty without seeking reformation, no recovery can be had, either against the principal or surety.

HAMILTON, J.

This action is brought to subject the defendants to liability upon a penal bond, given in the sum of \$10,000 for the faithful execution of the duties of the defendant Watson, who, it is averred, was elected and qualified as the treasurer of the school board of Berea village, it being alleged that as such treasurer he got some ten thousand and odd dollars of money into his hands, which he has converted to his own use, and that he executed this bond with the other defendants as sureties.

A copy of the bond is set out as a part of the petition. It appears from the bond that there is no obligee named in it; neither is there any blank left for the name of the obligee. It is filled up regularly, but nobody named to whom payment is to be made.

Watson makes no answer. The sureties answer, and deny that they ever executed any writing obligatory whatever—they say it is not a bond. They do not deny that they signed this paper, but they say that there is no obligation resting upon them to pay this money.

The case is submitted to the court upon this petition an answer and the opinion of the court is asked as to whether there is a liability in favor of the state of Ohio, for the use of this board as against these parties.

We have come to the conclusion that we must answer this proposition in the negative—that there is no liability under this bond.

It will be noticed that this is not a petition seeking to reform this bond—to carry out the intention of the parties—but that it is a suit upon the bond.

The supreme court, speaking about questions of this character, say that such a construction may be regarded as somewhat technical, and that the ends of justice really require that the intention of the parties should be carried out, and that they should be obliged to pay what they evidently intended to pay, to wit: the defaults of the principal; but they say, nevertheless, that the common law doctrine is that there must be an obligor and an obligee in every bond, and that while the bond may be left blank as to the date and name of the obligor, where the bond is signed at its conclusion, those blanks being immaterial, and such as can be filled up at any time (and whether filled up or not an action might be maintained upon the bond), yet where a blank is left for the penalty, and a blank left for the name of the obligee, the bond is void.

There is a case reported in the 5th North Carolina Reports which, as I apprehended, is precisely like this. That was an action brought by the administrator of a constable. Judgment had been rendered against a certain party; the judgment creditor had issued an execution and delivered it to the constable, who made a levy upon the personal property, and took a redelivery bond, leaving the property in the hands of the defendant. The bond did not state to whom it was payable, but stated that the property should

be forthcoming for the use of the plaintiff in the execution, naming him; and the court held that the obligor and an obligee were both material and essential parts of a bond, and not being named there could be no recovery upon the bond.

As to whether or not this is an instrument that can be reformed in a proceeding in equity, it is not necessary now to determine; but holding as we do that it is void as a bond, there can be no recovery upon it against these sureties. Neither, though Watson does not answer, can there be any recovery against him. It is simply void—payable to no one. Still, Watson, doubtless, can be made responsible irrespective of the bond upon proper allegations.

Judgment will therefore be rendered for the defendants.

S. M. Eddy for plaintiff; Henderson & Kline for defendant.

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**\* EVICTION—PLEADING.**

[Cuyahoga Common Pleas, May Term, 1879.]

† ROSA M. STOW v. N. A. GILBERT ET AL.

In an action for breach of covenants of title, an averment by the plaintiff that there was a prior incumbrance outstanding, which has been foreclosed and order of sale made, and sale had and confirmed to a party, a stranger to the action; *Held*, that is a sufficient averment of eviction, whether the action be on the covenant against incumbrances or of warranty.

HAMILTON, J.

The petition is brought to recover on account of an alleged breach of certain covenants contained in a deed made by these defendants, Gilbert and Smith, to the plaintiff. It is averred that upon a certain day the premises described in the petition, were sold and conveyed by these defendants to this plaintiff for the consideration of about twenty-five hundred dollars; that eight hundred dollars of it, a cash payment was paid, and that the balance was subordinate to a mortgage of \$1,700 given by these defendants to Linn, from whom they had purchased the premises and given back this \$1,700 mortgage to secure the purchase money.

It is set out in the petition that this was a warranty deed, warranting the premises to be free from all incumbrances whatsoever, except this mortgage of \$1,700, and with the usual covenants of seizen attached, and that by the express terms of the agreement between them she was to assume and pay this mortgage of \$1,700; and set out that she did pay this mortgage debt, and paid it before its maturity. It is further averred in the petition that there was a mortgage running to one Chase, covering these lots and a large number of other lots, being for the original purchase price of the entire tract of which these lots constituted a part. That subse-

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† See 1 Clev. Reporter, 172, page 252 this volume.

quently to this sale to the plaintiff by these defendants that mortgage was foreclosed, and the premises covered by the mortgage, including these lots, were sold. She avers that her title was therefore lost to her, and she was evicted from the premises.

The case was before the court sometime ago upon a motion to make the petition more specific and certain. That motion was overruled. An answer was interposed, setting up substantially this state of things: admits that they made such a deed; that they made such covenants of warranty of seizen and against incumbrances, and that she assumed to pay the debt; that she did pay it; that she paid it before maturity. It denies all else in the petition, and sets up a special defense, that notwithstanding they made this deed, as averred in the petition, expressly admitted by them, containing all these covenants of warranty, as a matter of fact Linn of whom the premises were purchased by these defendants was at the time insolvent; that he has been so ever since; that they were well apprised of the existence of this Chase mortgage, and that this plaintiff was apprised of its existence also, and for the purpose of protecting the interest of these defendants in the premises at the time they executed their mortgage and notes to Linn, they endorsed upon the notes the following stipulations, to wit: "Not transferable until the land described by the mortgage securing this note is cleared from all incumbrances."

They say that this was for the purpose of protecting them so that in case the prior mortgage of Chase against which Linn had covenanted by his deed to them was not paid, that they might make a defense as to this purchase money; and they say she knew of these facts, and state that before those notes matured she went on and paid them to a party who claimed to own them. That a certain amount of discount was made on the notes by reason of their being paid before maturing, and they say in this state of facts, equity and fair dealing would require that this plaintiff should not have paid those notes before maturity; neither should she have paid them after maturity until this incumbrance upon the property had been taken off. Otherwise it leaves them without any protection at all in the case.

Now, we are inclined to the opinion that this is a good defense to this action. Here are the covenants made by these defendants in express terms warranting these lots against all incumbrances except their own mortgage. It seems to me that they are bound by the terms of their written \*covenant and that they are 322 estopped from saying that such a mortgage existed, and that she should have acted in view of that fact. They further set up that they were obliged to bid in this land through another party; that the time this land was foreclosed under this order of sale that they made arrangements with Chase, if he could, to bid in this land for these defendants for the sum of \$900, and that in pursuance of that arrangement he did bid in this land and convey it to these defendants sometime in March prior to the commencement of this

action. So that they say that the title to these lots never was lost—never did pass away—that they were bid in by Chase, as he agreed to do, in trust for them. That subsequently they got this deed and the title to the lands became perfect in them; and therefore as a matter of fact there never was any evidence in law, because they had made their covenants good.

Now we are inclined to think that this is not a good defense. When the case was previously before the court the court held—upon the face of the pleadings—it being averred that the title had been entirely lost to her, swept away by reason of those outstanding incumbrances, against which they had warranted—that her action was maintainable for the consideration money that she had paid, that she might regard it as gone, and that she need not wait for an actual eviction; that it was equivalent to an eviction. But when this answer comes in and sets up a different state of facts—denying that proposition—saying as a matter of fact that the title has always been good; that she never has been disturbed, neither in fact nor in law, we think that constitutes a good defense to this action. In deciding the case before, the court cited the following: Rawle on Covenants, p. 164: "When an incumbrance is such as entirely to defeat the estate, conveyed, but its consequences have not been such as to cause an eviction within the scope of a covenant of warranty, the damages are measured by the consideration money and interest. Where the incumbrance was changed into a title adverse and indefeasible, the plaintiff was entitled to recover the money he had paid for the land with interest; for in such case the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance nor can he enter upon and enjoy the land; and it would be idle to require him to purchase it in order that he might be entitled to his damages for the break of the covenant against incumbrances."

Such was the law at that time, and such, we think, would be good law today.

Under this state of facts it appears that the title has not been defeated, and that the incumbrance has not been changed into a title adverse and indefeasible. We do not think that this special defense that is set up here, the payment by the plaintiff of this \$1,700 before its maturity—establishes any equity in favor of the defendants at all, so that, notwithstanding she had paid precisely what she had covenanted to pay, the \$1,700 mortgage in full, they ought to be entitled by this equity to get back this \$900, and have a personal judgment against her for that amount. We do not think there would be any equity in such a claim.

The demurrer to the answer is overruled.

Robison & White for plaintiff; Ranney for defendant.



## JUDICIAL SALES.

[Cuyahoga Common Pleas, September Term, 1879.]

WARNER ET AL. V. BENTE ET AL.

Where an individual interest in certain lands was decreed to be sold, without a finding as to what that interest was; *Held*, that this proceeding was defective and the sale should be set aside.

HAMILTON, J.

This case is before the court on a motion to set aside a sale. On looking into the order made I find that the master was directed to sell "the undivided interest of F. Bente in three several parcels of land."

In the first petition filed in the case it was averred that the interest was an undivided one-eighth in common in these three parcels of land. It is subsequently discovered that the principal defendant, F. Bente, was insane and in the asylum, and the plaintiff comes in and asks leave to file an amended petition, and in that petition he sets out that F. Bente had an undivided interest in these three parcels of land, but fails to aver the extent of the interest, whether it was one-eighth or some other amount, and goes on to set out the fact that the plaintiff obtained a judgment before a justice of the peace, filed a transcript, issued an execution and levied on this undivided interest.

One of the other defendants sets up in an answer and cross-petition substantially the same state of facts; saying that on his judgment execution was levied on the undivided interest of Bente in these three parcels of land. Therefore it does not appear anywhere in the pleadings upon which this decree was taken what interest F. Bente had.

One of the objects of this creditor's bill must have been to determine that very question as to what that undivided interest was: but instead of a determination of that question the decree goes on to say that the court takes an account, finds the respective amounts due upon these judgments; that they are liens upon the property, and then orders the interest of F. Bente in these premises sold. An order of sale is issued to sell that undivided interest.

The master under that order called three appraisers, who make a return to the court that they have appraised the undivided interest of F. Bente in this property. From an affidavit made by the appraisers, and filed in the case, it appears that they appraised a one-eighth interest in common in the three parcels of land subject to the dower interest of the mother of F. Bente, a defendant in the case, he having inherited the property from his father, and subject also to the dower interest instead of F. Bente's wife. It ought to be remarked, perhaps, that neither F. Bente nor his wife has made any answer in the case at all. Neither does it appear that F. Bente's wife had any guardian *ad litem* appointed for her.

It is said by the attorney who drew this decree and amended petition that he did not allege what the undivided interest was, because he did not know what it was. The court did not ascertain what it was, no evidence was offered on the subject, and yet the master was ordered to sell an undivided interest, which the attorney did not know what it consisted of, and the appraisers go forward and from their acquaintance with the family they undertake to find out what the undivided interest of F. Bente is and appraise it.

The motion to set aside the sale is on various grounds: the informality in the sale, the failure of the master to take certain bids which he might have taken. It is sufficient to say upon that branch of the question that the court has already decided that the motion is not well taken. But the question still remains as to whether under that state of facts, such an order, such decree and such pleadings in the case there could be any sort of an appraisal in accordance with law.

We are unable to determine how these appraisers could appraise an interest which is not ascertained, which they could not know, except from outside information, the correctness of which nobody can tell.

323 It seems to me there is a radical defect \*in this decree; that it is uncertain, and never can be executed; that there never ought to be a confirmation of a sale thus made. Nobody can tell whether the real interest was appraised or not. Upon a deed being made the auditor can make no transfer of it because nobody can tell what the amount was. We think under this state of facts the sale should be set aside, leaving the parties to such remedies as they think they have, either by reinstating the case and determining what this undivided interest is or to take such other course as they see fit.

J. B. Fraser for plaintiff.

DeWolf & Schwan and J. T. Sullivan for defendants.

## GUARDIAN AND WARD.

[Cuyahoga Common Pleas, May Term, 1879.]

ISABELLA DANGLEHEISEN v. A. ALEXANDER.

Where the ward was a married woman, and there was no agreement with her guardian that her separate estate should be liable, and as the law imposes the obligation on her husband, board for the ward, her husband and children, by the guardian, cannot be charged in his account.

329 \*McMATH, J.

This action is brought by plaintiff, a married woman, against the administrator of her guardian, who was her mother. Before the

settlement of the estate by the guardian she died, and Alexander, her administrator, is called to account for the amount in his hands belonging to the plaintiff. The mother of the plaintiff by the last will and testament of the plaintiff's father was made the guardian of the plaintiff and had the absolute control of the estate subject to certain conditions—that she was to rear, educate and maintain the children out of the proceeds of the estate until they became of age, and whatever remained of the proceeds of the estate after providing for the children she might, under the will, appropriate to her own use.

The case is before the court on the confirmation of the report of the referee. In the report of the referee the plaintiff is charged with an item of \$350, to which is added interest for the period of ten years for board of plaintiff, her husband and her children by the guardian for a period of about twenty months. It is the opinion of this court that the testimony does not sustain the finding of the referee. There was no agreement between the plaintiff and her guardian that the separate estate of the plaintiff should be charged for the maintenance of herself, husband and children. In the absence of any express agreement the law imposed that obligation upon the husband. It is doubtful whether such an agreement would be binding upon the wife, if made, but that question is not fairly raised in the case. Whatever may be due for the support of the plaintiff, her husband and her children to the estate of the plaintiff's mother, is due from the plaintiff's husband, and not from the plaintiff. In respect to that item, therefore, the report of the referee is overruled.

Arnold Green for plaintiff; Stone & Hessenmueller for defendant.

### HUSBAND AND WIFE.

[Cuyahoga Commor. Pleas, September Term, 1878.]

MAX E. SAND V. ANNA M. SIRL.

A petition alleging that a married woman owns separate real estate, and that she buys goods in her own name, and that she agreed to charge her separate estate with the purchase of the goods; *Held*, that an answer denying that she ever agreed or intended to charge her separate property, is bad on demurrer, as this would be a mere denial of a conclusion of law, as deduced from the facts alleged and admitted in the petition and answer.

HAMILTON, J.

This action is brought to subject the property of Anna M. Sirl, who, it is alleged, is a married woman, for the payment of the claim set forth in the petition. The claim in the petition is that at the date of receiving the goods named therein she was a mar-

ried woman, carrying on business in her own name, to wit: the grocery business; that she owned real estate in her own right as her separate property; and that she also owned the fixtures and goods in the grocery establishment of which she was the proprietor; that while this state of facts existed she purchased of the plaintiff a certain amount of goods for her grocery business, and that she then and there agreed to charge her separate estate with the payment of the amount of the bill thus purchased.

She denies that she ever promised or agreed to pay this claim out of her separate property, and says that she \*never intended to and did not charge her separate property with the payment of the claim.

To this answer the plaintiff demurs upon the ground that it does not state facts sufficient to constitute a defense. We think the demurrer is well taken.

The averment in the petition is that she bought these goods for her separate use to be used in this business which she was conducting. It is conceded in the answer that she was the owner of the real estate and personal goods named in the petition; that she received the goods upon her request and to be used in her separate business, and then denies she ever intended to or did charge her separate estate. It seems to me to be a denial of the conclusion of law which would result from the facts set forth in the petition. It would seem to the court that if these facts be true, which she concedes to be true, that the law would imply an obligation upon her part to pay the debt, and would, as a matter of equity, charge her separate property with its payment, and to deny that, in terms, she made any express agreement to pay for the goods is, we conclude, not a sufficient answer to this petition.

It would be analagous, it seems to me, to a defendant coming in and admitting, when sued upon an account, that he had the goods at his request, and that they were of the value named, denying that he ever promised to pay for the goods. The demurrer will be sustained.

Weed & Dellenbaugh, attorneys for plaintiff; Kelley and Arnold, for defendant.

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### LIMITATIONS OF ACTIONS.

[Cuyahoga Common Pleas, September Term, 1878.]

JONES, Ex'r., v. KIRBY, Ex'r.

Where a person agrees in writing to pay another money out of what he collects on a debt, his obligation is upon the instrument, and where he has wholly disclaimed any trust relation, such person does not hold as on a continuing trust, and after the statute of limitations has run against the writing, the liability is also barred.

HAMILTON, J.

This is an action brought upon certain writing obligatory executed by the defendant's testator to the testator of the plaintiff. The petition sets up the fact that the plaintiff, Mary C. Jones, was duly appointed the executrix of one Jones, and that the defendant, Kirby, has been duly appointed the executor of another Jones. It goes on to set out that sometime in August, 1859, defendant's testator executed and delivered to the plaintiff's testator the following instrument:

"Cleveland, O., Aug. 1, 1879.

I promise for value received to pay to the order of Alanson G. Jones out of a debt due from Nathan S. Jones to my partner Nathan G. Jones, amounting to about eighteen hundred dollars, more or less, and the sum of \$300 with interest from date. Said payment to be made out of the first moneys that shall be collected on said debt, after satisfying prior claims given to Garrett Voorhiet and Emeline Voorhiet his wife, and another to George B. Holbrooke and Salina Holbrooke his wife, and another claim now negotiating if given to Galvin Jones. E. M. Jones."

It further says that E. M. Jones during his lifetime, made this collection in full of \$1,800 and more, and that there was more than enough to pay this claim which is prior, in point of time, to the payment of the plaintiff's claim, and that he has wholly failed and refused to pay over to the plaintiff's testator during his lifetime the amount of the claim, and that she, as the executrix, has duly presented this claim for allowance to the defendant, and that it was by him refused. She further says that the claim sued upon originated in a trust obligation of E. M. Jones, deceased; that he became possessed of this money, to wit: one thousand eight hundred dollars, that was coming to the father of E. M. Jones and of the deceased testator as a trust for the benefit of Alanson G. Jones, and all the other parties named in the instrument. And that he has never executed this trust, but that he collected it sometime in 1866, and that ever since its collection he has failed and refused to pay it over, and therefore he never has executed this trust.

The defendant for one defense answers and pleads the statute of limitations. First he denies all the allegations in the petition practically. For a second defense he denies the fact that such a collection was made, or if it was that there was nothing in it, for the reason that more than fifteen years had elapsed and, therefore, the action is barred. To this second defense a demurrer is filed and it is said that the statute of limitations does not operate in this case, because this fund being a trust fund by the express provision of the statute it does not operate against a continuing and subsisting trust, it being provided by the express provisions of the statute that it does not operate against a continuing and subsisting trust.

It would seem to the court that this case is somewhat analogous to a case where a person is authorized to collect a debt and

he collects it, and fails to pay over the money. In such a case the trust is always created, and the obligation arises in that way. It would seem to the court further that this action is founded upon this writing obligatory, and upon the promise to pay expressed in that writing; and it is expressly averred in the petition, that he wholly refused to recognize the obligation of the instrument immediately upon its collection by him—wholly disclaimed ever since any trust relation or anything else—denied any obligation arising under it and refused to pay the money. That seems to be the substance of the declaration.

I suppose if an attorney should collect money as an attorney, and should give his note for that money, the liability would depend upon his obligation upon that instrument, and after the statute of limitations has ran against the note, it could not be said it was a subsisting and continuing trust.

It is averred the defendant come into possession of this money by reason of being a trustee and has continued in possession of it by reason of being trustee. Is it a continuing and subsisting trust? Is it not rather in direct negation of that assertion—in violation of any such idea? Simply denies, disclaims any obligation under it at all.

In the 1st O. S. this language is used: "Although it is true, as a general rule, that as between trustee and *cestui que trust* laps of time is no bar, yet it is equally true that where the former, with the knowledge of the latter disclaims the trust either expressly or by acts that necessarily imply a disclaimer, and that unbroken possession falls in the trustee and those claiming under him for a period equal to that described in the act of limitations to constitute a bar, lapse of time, under such circumstances, may be relied upon as a defense."

Now, here was a disclaimer, certainly by the acts of the parties refusing to pay—disregarding the obligation under it—refusing to recognize any obligation. The case of subsisting or continuing trust, we can well understand. For instance: One party, A, gets B to sign a note for him as surety. To secure B he transfers a piece of land to C. And then B has subsequently paid that note. By reason of his being surety the statute of limitations runs against the claim as a money claim, yet the property which was put in the hands of C being a continuing and subsisting trust in C's hands, for the purpose of paying and protecting the interests of B as surety may be subjected to the \*payment of that claim notwithstanding the claim itself would be barred. But we think this obligation rests upon this note. There is no fund specially set apart as a trust fund, so that it could be said it was a continuing and subsisting trust.

With these views we think the demurrer must be overruled.

Robinson & White, for plaintiff; Mix, Noble & White, for defendant.

**\*NEGLIGENCE.**

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**JAMES BOHASLAV V. THE STANDARD OIL CO.**

[Cuyahoga District Court, March Term, 1879.]

Rouse, Lemmon and Finnefrock, JJ.

In an action for damages for personal injuries, the question of contributory negligence on the part of the plaintiff should be submitted to the jury.

**FINNEFROCK, J.**

The plaintiff in his petition states that on the 17th day of July, 1875, and for a long time previous to that time, he was in the employ of the defendant, and on said day was running a planing machine, which in the testimony, is called a floater, used for planing off barrel heads, and that while running this machine he was injured, had his left hand cut off, through the negligence and misconduct of the defendant; that on his part he used due care. It is also stated in the petition that while he was in the employ of the company he was put at one thing and at another. This machine at which he was injured was used in the cooper shop designated by the company as No. 3. That his superior who was placed over him in shop No. 3 set the plaintiff to running this machine, and they were engaged in bringing staves with a wheelbarrow to where they were to be put on a platform, and the machine stood close to the passage way between two doors; that there were no guards placed behind him, and the space behind him where persons came by with the staves was very narrow. It is claimed that there was negligence of the company first in this: that the company did not furnish proper machinery and proper conveniences to bring the staves and headings to this platform, and he says there was negligence in this, that they used a wheelbarrow for that purpose having but one wheel, and that it was easily tipped over, and by tipping over the person who was feeding this machine was liable to be thrown into the machine and thus injured. Again, the plaintiff complains that there should have been a guard put up behind him, that the company allowed this handcart to be taken back and forth between him and the wall, and that there was danger resulting from that. He says the company was also negligent in not furnishing a table upon which these headings could be placed which should have been placed between him and the wheelbarrow.

To this petition there is an answer substantially denying everything set up in the petition, except the fact that the defendant is a corporation doing business in this city, and that the plaintiff was in his employ.

The answer then states that this wheelbarrow and platform were

<sup>†</sup>Affirmed by supreme court, November 28, 1882, without report. On authority of 24 O. S., 83, 8 B., 287, fly leaf.

such as were in ordinary use in a business of the kind in which they were being used, and that there was no necessity for the other protection for the want of which the plaintiff complained; and states, in short, that the plaintiff knew all about the condition of things as they existed before he commenced this employment; therefore, that he entered upon that employment with his eyes open, assuming all the risks incident to that employment.

This case has been tried several times. This probably was the fourth trial. The plaintiff offered his evidence and rested his case. The defendant then made a motion for a non-suit upon the ground that there was no evidence tending to establish or sustain the claim made by the plaintiff in his petition. It was also claimed that there was contributory negligence on the part of the plaintiff and, therefore, he could not recover. But we are not required to pass upon the question as to whether a court has a right when called upon to examine a question as to whether a non-suit should be granted or not to say whether there was contributory negligence on the part of the plaintiff in the case. We apprehend, however, if that question is raised it could very easily be disposed of; that it is not for the court to say whether there was contributory negligence, but that it should go to the jury. But a motion was made to arrest the testimony from the jury and render judgment for the  
**338** defendant. Where there is an entire want of evidence\* to sustain the plaintiff's claim, the court may direct the jury to return a verdict for the defendant. (24 O. S., 83.)

We were informed in the argument that the court in this case directed the jury that there was no testimony at all sustaining the plaintiff's claim and that the verdict must be for the defendant, and the verdict was so found. A motion was made to set aside the verdict which was overruled and a bill of exceptions was taken, and the action of the court below is now before us for review.

The only question which is before the court is this: whether the plaintiff in the case offered any evidence which tended to establish his claim. The law is well settled that where there is any evidence tending to establish the claim of the plaintiff it is error for the court to take the testimony from the jury. Under our system the jury is to be the judge of the facts.

It is claimed that there must be testimony tending to establish all the points necessary to be established to constitute a cause of action; that if there are two points to be established and upon one of them no proof is offered that the court, in such a case, ought not to hesitate to take the case from the jury.

The question presented for our consideration is simply, is there any evidence in the case, tending in any degree to establish the plaintiff's claim. [The court here recited the testimony and continued.] This being the state of the proof ought this evidence to have gone before the jury? The court below in disposing of this case said that he would not allow the testimony to go before the jury because there was no evidence tending to make out the plain-



tiff's case, the evidence showing that the plaintiff was guilty of contributory negligence. That contributory negligence is said to be this, that the plaintiff knew these circumstances; that he knew that this car was passing behind him, and knew the character of the wheelbarrow, and knew what kind of a load was brought upon it. It is further claimed that any man who takes charge of machinery is presumed to know the character of machinery, the dangers that attend the running it—is presumed to know as much about it as the best mechanic in the world, and if he undertakes to run it without knowing the character of it he assumes the risk of all dangers incident to running it. We apprehend that is not quite correct. [The court here reviewed the case of *Railroad Company v. Fitzpatrick*, 31 O. S., 479.]

Now, taking this case upon the question presented here. Grant that the plaintiff knew of this wheelbarrow, its character, how it was loaded, how it came up, how the heading was taken from it, that there was no table between him and the wheelbarrow, that there was no guard behind him, that there were persons passing between him and the wall with the wheelbarrow, and knew this handcart was being run to and fro there by permission of the defendant all the while, but how could he know that this wheelbarrow when brought up—this handcart running back of him would strike him and tip these boards over behind him from which he might receive an injury? We think this was a question to go to the jury to say whether he was guilty of any contributory negligence. If the plaintiff was guilty of some negligence on his part it does not follow that he is thereby precluded from a recovery, for, notwithstanding the negligence on his part, if the defendant by the exercise of ordinary care and diligence could have avoided the injury the plaintiff will still be entitled to recover. So that in any event if we say that the plaintiff was negligent in taking these risks, to some extent at least, yet it is a question for the jury in the first place, to say whether he was negligent in taking the risks, and, if he was, whether the defendant did not exercise proper care and diligence, and if by the exercise of proper care and diligence the injury would have been prevented then, in that case, we apprehend the plaintiff would be entitled to recover. These are all questions of fact for the jury; and we think the evidence in this case was of such a character that it should have been left to the jury to say what the facts were in the case, as to the plaintiff's right to recover. For these reasons we think the judgment below must be reversed.

Stone & Hessenmueller, for plaintiff in error; M. R. Keith and J. E. Ingersoll, for defendant in error.

## LIBEL—PLEADING.

[Cuyahoga Common Pleas, September Term, 1878.]

CHARLES E. READER V. ANDREW PLATT.

In an action for libel, allegations that defendant wrote and published a letter and setting out a copy of the letter, in substance, that the plaintiff, 'soon after the fire went away; that this and the amount of insurance paid caused considerable comment among the neighbors; and that an investigation might be beneficial, does not support an innuendo that a charge of arson was meant. The general statement that the defendant published false and scandalous matter, without alleging which matter of the letter it is, is too indefinite.

HAMILTON, J.

This is an action in which the plaintiff seeks to recover the sum of \$25,000 damages for the publication of a libel by the defendant. The plaintiff sets out that at a certain time his wife was the owner of a certain stable and horses that were insured; that they were lost by fire and the loss was paid. It is then alleged that the defendant "falsely, wrongfully and maliciously contriving to injure the said plaintiff, wrote a letter and published in the letter certain false, scandalous and defamatory matter concerning the said plaintiff," and then sets out a copy of the letter. The letter, which is a letter to the insurance company, substantially says, that the writer, Platt, the defendant in this case, held a mortgage upon this personal property and that he was away in Pennsylvania at the time the fire occurred; that the parties, Mr. and Mrs. Reader, soon after the fire went away, and he says that the amount of the loss paid, and these facts caused considerable comment among the neighbors in relation to the fire. He therefore thinks that an investigation might be beneficial in the case. That is the substance of the letter and all there is of it.

The plaintiff goes on to say by way of innuendo that the defendant meant to charge the plaintiff with the crime of arson; that he meant to charge that he burned the property for the purpose of taking possession of it and of preventing the defendant from taking possession of it and getting the insurance money. It is not quite apparent how he could have any such intention as getting possession of it to prevent the plaintiff from getting possession of it, and getting the insurance money upon an insurance contract to which he was not a party, the property belonging to the wife.

It is stated that the defendant published certain false and scandalous matter and a copy of the letter is given. There is no allegation as to the particular matters in the letter that are false and scandalous, but that certain facts in the letter were false. What facts? The petition is too indefinite to make any charge in the language used, and the demurrer is sustained.

S. E. Adams and R. T. Morrow, for plaintiff; S. B. Buxton, for defendant.

**MORTGAGE—JOINDER OF ACTION.**

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[Cuyahoga Common Pleas, September Term, 1878.]

**STONE V. BECKER ET AL.**

Where a mortgagor sells the land to one who assumes the debt, an action to foreclose may include claims for personal judgments against both the mortgagor and his grantee.

HAMILTON, J.

This is an action brought to foreclose a mortgage given by John F. Becker and Eliza Becker, his wife, to secure a note made by Beckers. It seems also by the petition that the grantors of the mortgage have assigned their equity of redemption by deed to the defendant Edward Bronson, and that he has assumed and promised to pay the mortgage indebtedness. It further appears by the petition that the indebtedness grew out of a loan of money made by Amasa Stone to Louisa Becker for the purpose of purchasing real estate now owned by her, other than that included in the mortgage. The action is an ordinary one to foreclose a note and mortgage and asking for a personal judgment against John F. Becker in the first cause of action, and in the second cause of action asking a personal judgment against Bronson, the present owner of the land, on his obligation in assuming and promising \*to pay the note and mortgage. The third cause of 347 action is against Eliza Becker, a married woman, seeking to subject her separate estate other than that included in the mortgage, by certain averments in the petition saying that at the time of the execution and delivery of this mortgage she was the owner of certain other separate property in her own right, and that this loan was perfected for the purpose of enabling her to purchase this property, and that it was her intention on the execution and delivery of this note, and that she did charge this other separate property, and therefore asks that this separate property of hers other than that included in the mortgage be also subjected to the payment of this claim. The fourth cause of action is for the foreclosure of the mortgage and asking the sale of the mortgaged premises.

Demurrers to this petition are interposed by John F. Becker and his wife, Eliza Becker, separate demurrers, but for the same reasons. The first is that several causes of action are improperly joined; second, the several causes of action against the several defendants are improperly joined.

This court at the present term has held that a judgment might be obtained against the purchaser of mortgaged premises, where he had expressly assumed and promised to pay the mortgaged indebtedness as a part of the purchase price of the land, in the same action in which the mortgage was foreclosed, and a personal judgment had against the maker. This decision was made in following what

was supposed to be a prior decision made by another branch of this court. No reasons were given at the time, because, if I may be allowed to speak for myself, I see none. I do not believe in the doctrine. I am of the opinion that a separate cause of action against the party who assumes the mortgage indebtedness and promises to pay it—an independent obligation—should be brought in a separate action, and ought not to be joined with the other action to foreclose the mortgage and get a personal judgment. But while in some sense it may be connected with the subject matter of the transaction, what is there to bring it within the provisions of the code, so as to allow a personal judgment against the party thus assuming it? It certainly does not affect the other defendants in the action. It is not enough that all the parties to the transaction are connected with the subject of the transaction, but the judgment in each cause of action must in some way, though unequally, perhaps, affect all the defendants in the action. I give that, however, as my own individual opinion, not concurring in the doctrine that they may be united. But passing that, the ruling of the court being otherwise, I desire to follow it simply to have unanimity in the holdings.

Then the question arises whether this cause of action in this case, where the separate property of the wife independent of the mortgaged property, is sought to be subjected to the payment of this claim, can be united also without making it objectionable upon the ground taken in this demurrer. It is my opinion that it cannot be so united, but I am not prepared to extend the doctrine for the reasons already suggested, going beyond what I suppose to be the rule of this court.

Now, Eliza Becker having parted with all the interest she had in that mortgage property, was not a necessary party to the foreclosure at all of the mortgage. She might in some sense be called a proper party, so that if she did claim any interest in the mortgaged premises she might be brought in and she could disclaim it, or simply refuse to answer at all, so that her interest might be finally disposed of. Where the record discloses the fact that the party has parted with her interest in certain realty, it might have been parted with to a trustee, for instance, and she might still have a beneficiary interest in it, and I see no objection to making such a party a party to a proceeding to foreclose. While I say she is not a necessary party, still she might be regarded as a proper party for that purpose. But not being a necessary party, she has upon the record apparently no adverse interest. And how it can be said that we can make an independent cause of action against her to subject her interest in separate property which she owns outside of the mortgage to the payment of this claim, and still say it affects the other party to the transaction sued here, I am unable to see. Certainly the purchaser of this land, Brouson, has no interest in this other property at all, and it is entirely immaterial to him about the other property. He has no sort of interest or connection with or pretense of any connection with her other property. It does seem

to me that it in no sense, therefore, affects him. For this reason we think this demurrer is well taken; that all these causes of action can not thus be joined in one proceeding; that it raises separate issues and makes an amount of costs for somebody to pay.

We think they are joined improperly. For these reasons we are compelled to sustain the demurrer.

R. E. Knight, for plaintiff.

Charles Coates, for defendant.

## CORPORATIONS.

[Cuyahoga Common Pleas, September Term, 1878.]

### HENRY MORRIS V. THE COLLAMER & ST. CLAIR ST. R. R. CO.

Where some of the defendant stockholders claim to be creditors, and ask an adjustment of their rights, and a reply of the corporation alleging that they had agreed to manage the company for a time and pay specified debts, and asking an accounting and damages for breach of the agreement, is not to be dismissed, as not proper to be settled in the case.

HAMILTON, J.

This is a motion to strike out portions of the answer and cross-petition in this case. The action was brought by Henry Morris as a judgment creditor of this railroad company. He avers that he obtained a judgment upon his claim; that execution issued; that it was returned "no property," and that the company was insolvent, and then sets out the names of the stockholders so far as he is able to ascertain them; and further avers that whether or not the amount of the stock has all been paid in by the stockholders he is unable to say, but asks that the company and stockholders both answer and disclose the facts in reference to them, and that if there be any unpaid stock, he seeks to subject it to his claim and to the claims of all the other creditors, the action being brought in behalf of himself, and all the other creditors of the company; and he further seeks to subject the statutory liability of the stockholders.

Among the stockholders who are made defendants in this action are the parties who are making this motion. These parties come in and by way of answer and cross-petition set up the fact that they are the creditors of the company by reason of holding certain bonds of the company, each one of them setting up by way of answer and cross-petition that he holds certain of these bonds, and avers that the company is indebted to the amount of that bond to him respectively, and asks that this matter be taken into account in establishing their liability, and for equitable relief generally in this case.

The company, by way of reply to this answer and cross-petition of these parties, avers that at a certain time these parties entered into a written contract with the railroad company by which they

were to become purchasers of the rolling stock, the horses and all the movable property of the company, and were to run the road

348 \*for a certain length of time, and one of the considerations of this contract was that they were to pay this identical debt of the plaintiff in this action and some others; that as a matter of fact they did enter into possession of the road and this stock, and they did run it for a certain length of time, and they perhaps see the property going into the hands of a receiver. They say now they want an account taken of the time that they have run the road, and want to be allowed for it in the adjustment of these matters between the company and these defendant stockholders, who are in one sense also plaintiffs in the case, so far as their claims against the company are concerned—either want this account taken or want damages for the non-fulfilment of this contract which was thus entered into in writing. A copy of that agreement is set up in this answer and cross-petition of the company.

To this answer and cross-petition of the company these defendants make the following motion: To strike out the so-called amended answer of the defendant, the Collamer & St. Clair St. R. R. Co., or so much thereof as purports to be a cross-petition, or is in the nature of a cross-petition against these defendants, to-wit: that part thereof which commences in these words: commencement and termination given in the motion. It substantially strikes out all the averments in relation to this claim which the company has against these parties as thus averred in the cross-petition. Second, to dismiss the cross-petition of the defendants, said railroad company, on its application for affirmative relief against them, because it does not contain a proper subject matter to be litigated against these defendants in this case, the theory of the movers of this motion being that this is an action, as they say, to subject the statutory liability of the stockholders in this company to the payment of these claims. It is, however, something more; it seeks to subject any unpaid subscription or unpaid stock as well as the statutory liability, it being a suit on both of these causes of action to subject both of these funds.

It has been decided repeatedly by our supreme court that both of these things may be thus subjected in an action. But it is claimed that this being an action either for damages or for an account upon this contract, really the gist of the action is for a breach of this contract; that this case having gone to a referee, that it raises questions to be tried by a jury, and the referee can not try it, that the parties have a right to be heard in court to a jury upon these questions, and that it is not a proper subject matter to be litigated here in this form of action; that they must go forward and subject this unpaid stock and the statutory liability of these stockholders, and if they have any rights as between themselves they may litigate between themselves, but that creditors are not obliged to wait until the whole equitable affairs of the company are settled up and disposed of and the assets subjected to the payment of the claim before the statutory liability is reached; in other words, where you sue

upon the statutory liability of both causes of action, the unpaid subscription and statutory liability, it is entirely immaterial about these questions of outside matters, these assets of the company, and claim that the company should proceed at once to get judgment against the stockholders without litigating these thousand and one claims of the company, as a matter of fact outstanding, and of an equitable character, but not legally assets that can be reached on execution.

I do not know that this question has ever been presented and passed upon directly by this court, but I have given it such examination as I have been able to, and against my first impression of this matter I have come to the conclusion that the only equitable way to dispose of this whole transaction is to have all these claims litigated in this action. It is for the purpose of subjecting the statutory liability as well as the other, and no way can be found of subjecting it or knowing what it is until those equitable assets are disposed of. To a certain extent it may be that the court has power to say how far this thing shall go, or how far it shall be litigated before proceeding upon the statutory liability. I think, as a general proposition, that the equitable assets should first be subjected before the statutory liability is reached. You may commence an action against both funds.

But the process of effecting the purposes of the action will be first to subject the equitable assets and then the statutory liability. I see no other equitable way of disposing of the matter. I am referred to Thompson's Liability of Stockholders. I see he holds a different doctrine. The main proposition, however, which he asserts is that both actions may be commenced at the same time; you may commence an action to subject both funds at once without first waiting to dispose of the equitable assets before commencing against the statutory liability. That has also been held in our own supreme court. But there is a case in Georgia which seems to warrant the doctrine that you need not wait in a case of that character. Suppose the defendant comes in and pleads that he has equitable assets. It is not necessary to wait to dispose of those equitable assets until you proceed against the statutory liability. That seems to be the general tenor of a paragraph in Thompson on the Liability of Stockholders, and in support of the doctrine, refers mainly to a case in Georgia in which there is a very elaborate decision by the supreme court of Georgia upon that proposition. That was an action against stockholders of a bank to subject them to liability under a statute in that state for the nonpayment of the bills of the bank, the bank having become in a measure insolvent. Under that statute it seems that bill holders were permitted to sue the stockholders in a court of law, and the stockholders were liable to respond in an action at law to the extent of the whole of the indebtedness of the bank, and each stockholder was to pay such a proportion of the indebtedness as the amount of the stock owned by him bore to the whole amount of the stock. It will be seen by looking at that case that it was ac-

tion at law especially authorized to be brought under their statute. This is an equitable action and held by our supreme court to be a proper method of reaching these sort of liabilities. That case in Georgia, when it is looked at, I think will be found to be simply an authority in support of the doctrine that an action may be brought at law where it is so warranted by statute.

Now, it would seem from some of the decisions of our court, where a bill in equity is filed against this statutory liability and against this unpaid subscription to subject these funds, so far as the stockholders themselves are concerned, and the company the parties to the transaction, it is maintained that an equitable lien has been acquired by the commencement of the actions against those specific parties; if so, it simply becomes a question of the order in which those equitable funds shall thus be subjected. This Georgia decision sustains the position that these equitable assets should first be subjected before reaching the statutory liability.

By the express language of our constitution and the statute passed to carry out that provision there is made an \*ultimate secondary fund, the primary fund being the assets of the company, including unpaid stock. That view of the case, I think, is expressly sustained by a case in Ohio and by the opinion of one of the judges in Ohio in deciding a case of this character. (20 O. S., 195.) The action in that case was brought to subject the statutory liability, also the unpaid subscription to the payment of the claims set up in the petition. They hold that the action is well brought. In commenting upon the case the judge delivering the opinion uses this language, but it is made no part of the syllabus which is the real thing decided :

"It seems to us that these causes were properly joined in the same action. The plaintiffs sought to subject two funds to the payment of his judgments. One of these funds, the balance due on the subscriptions, was primarily liable. In the event of its insufficiency, and in that event only, he might resort to the other fund, the *pro rata* for the stockholders were individually liable. It is the peculiar province of equity to marshal and apply such funds, and this can best be done where all the parties are before the court."

I do not think there can be any question as to the opinion of that judge upon that subject. We think the doctrine of that case in favor of that theory although it is not a part of the syllabus. Maintaining these views we think the motion should be overruled.

M. R. Keith, for plaintiff.

H. C. Ranney, for defendant.



**\*CORPORATIONS—INJUNCTION.**

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[Cuyahoga Common Pleas, 1879.]

**J. S. UPSON v. THE ROCKY RIVER STONE QUARRY CO.**

- 1, A forfeiture of stock by order of the directors although doubtless good between the stockholders and the corporation, yet as to outside parties would be fraudulent and may be enjoined.
2. In an action against a corporation to subject unpaid subscriptions a temporary injunction against the directors will not be dissolved, where part of the officers are insolvent, the solvency of the company doubtful, and as it is uncertain, if allowed to collect the unpaid subscriptions, they will apply them properly. But a receiver will not be appointed where bond is given that fund will go where it belongs.

**HAMILTON, J.**

This is an action to subject the statutory liability of the stockholders and unpaid subscriptions of the stockholders. A preliminary injunction was had, restraining the directors from making an assignment, or otherwise interfering with or disposing of the assets of the concern; it being averred that the company is insolvent; that the directors are insolvent; that the treasurer is insolvent, and that it was doing a great peril to the creditor's interests to permit that company, under those circumstances, to go forward and make its collections.

The answer denies the insolvency, and upon an examination of the case, it appears that all the property of the company has been mortgaged for its value and perhaps beyond, if the affidavits of the plaintiff are to be relied upon; perhaps not to the full extent of the affidavits of the defendant are to be relied upon. It is mortgaged to the extent of some six or seven or eight thousand dollars, so that there is nothing tangible to be reached on execution. Execution has been issued and returned no property.

The evidence would seem to disclose that four out of the seven directors are insolvents; it would seem further to disclose that the acting treasurer is wholly insolvent, and some fifteen witnesses produced here by the plaintiff state that all the property of the concern, land and personalty, is worth about \$5,000. By the affidavits filed here on the part of the defendants, the value of the property is put at \$14,000. There is some controversy about the debts. About six or seven or eight thousand dollars secured debts, covering up by way of mortgages, this property. Then there are other debts, making the whole indebtedness reach somewhere from twelve to seventeen thousand dollars. The company has ten thousand dollars of stock, forty per cent of which has been called in. There is not more than twenty thousand dollars of stock that is good for anything.

It appears that the operations of this company have not been such as they ought to have been, having failed to pay their debts

for a series of several months; perhaps years, have not paid their laborers; that several of these directors are making claims against this company; that they are issuing notes to each other, and that there is no sort of security or safety in permitting this concern, as at present organized, to go forward and make these collections. These matters are all denied. It is claimed that these directors are all acting in perfect good faith; while it is claimed upon the other side, that they have threatened to go forward and make these collections and forfeit any stock that was not paid to them.

The plaintiffs say, therefore, that it would endanger their liability to forfeit the stock, by non-payment, as by forfeiting the stock, the unpaid subscriptions could not be reached by the creditors. I doubt whether there is very much in that theory, because under such circumstances, if the debt has accrued and the directors attempt to forfeit the stock for non-payment of an assessment and it works prejudice to existing creditors, it would be considered fraudulent by a court of equity. I am aware there are decisions, holding that it does forfeit the stock; that you cannot hold them to a liability after you have done away with the benefits they might have reaped from holding stock. This, as between the parties, is undoubtedly correct. So far as it affects outside parties, it does not have anything to do with it. I am inclined to think it ought to be held fraudulent, so far as the creditors are concerned. Yet, under the whole state of this case without going into it in all its details, I am not willing to let this company go forward in its present shape and make these assessments and these collections without any assurance that the funds will be applied where they belong.

Application is made for a receiver and for a reference; and the other application is to dissolve this injunction. Now, I am inclined to think, that under the statute providing in case of the insolvency of a corporation or danger of insolvency, so that peril comes to the plaintiff, then a receiver should be appointed. If the doctrine be true, that by the filing of this petition they have got what is termed an equitable lien upon this fund, as between the parties to the transaction, to-wit: the unpaid subscription and this statutory liability which is a trust fund in the hands of the court, as seems to be held in the 22d of Howard, cited here in argument, it would be manifestly unjust, \*after attachment has been had, so far as  
356 these stockholders are to be regarded as garnishees in the case, it certainly would be inequitable and unjust to permit the defendant in the case to take this fund thus secured by attachment or by this equitable lien, and unless these parties are willing to come forward with a bond, so that the court can be assured that the fund will go where it belongs when collected, a receiver will be appointed in this case, and a reference will be had, as of course it must follow, and the injunction will not be disturbed, because it will be a protection to the receiver.

If we appoint a receiver under the statute, he should have authority to make all the orders necessary to effectually carry out

the receivership. While under the provisions of the statute, it may be somewhat difficult to maintain this injunction, yet, the fact of the fractional insolvency of the company, and the fact that a receiver, as I think, must be appointed—under this state of facts I think it unnecessary to disturb the injunction.

E. H. Eggleston, for plaintiff.

C. M. Stone and B. R. Beavis, for defendant.

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**\*CORPORATIONS—RECEIVER.**

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[Cuyahoga Common Pleas, November Term, 1879.]

HENRY C. WHITE, RECEIVER, ETC., v. J. E. INGERSOLL ET AL.

Receiver of an insolvent corporation cannot, as such officer, bring action to subject the statutory liability of stockholders of such corporation, to payment of its debts.

\*BARBER, J.

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This is a demurrer to the second cause of action in the petition.

1. That the plaintiff has not capacity to sue.
2. The petition does not state facts sufficient to constitute a cause of action.

The action is brought by Henry C. White, receiver of the Atwater coal company, and in the second cause of action, seeks to collect of the stockholders of the Atwater coal company, which is averred to be a corporation, an amount equal to the amount of stock held by each on account of their collateral statutory liability.

The petition first states that plaintiff is receiver of the property and assets of the Atwater coal company and trustee for the creditors of said company, as hereinafter stated. It then sets forth the organization of the corporation, the subscription to the stock, entrance upon business—incurring of liabilities and insolvency of the corporation and dissolution of the corporation by decree of the late superior court, at its June term, 1875; and plaintiff's appointment as receiver of all and singular the assets and effects of said corporation and trustee for its creditors agreeable to the statutes of Ohio; that he qualified and entered upon his duties. That he has assets to the amount of \$3,000 and no more to meet liabilities. That debts to a large amount have been proved—to such an extent that after applying all of the assets of the corporation, an assessment of at least fifty per cent. upon the solvent stockholders of their personal statutory liability will be required to pay all the liabilities. And he prays an account may be taken, and it may be ascertained how much will be required to be assessed on the stockholders, and that the several stockholders may be ordered, adjudged and decreed to pay into the hands of plaintiff such assessment on their stock to the extent of the lawful liability of such as shall be necessary and adequate

to pay the just debts and bona fide creditors and the costs and expenses of this suit and the winding up and settlement of the affairs of the corporation.

To this petition the above demurrer is filed by one of the stockholders.

It is necessary only to pass upon the first question made by the demurrer: Has the plaintiff capacity to sue in this action to subject the statutory liability of stockholders?

The plaintiff is appointed under the provisions of an act to provide for the voluntary dissolution of corporations. Section 476 reads: "Such receivers shall be vested with all the estate, real and personal, of such corporation from the time of their having filed the security hereinbefore required and shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders." Section 477: "Such receiver shall have all the power and authority conferred by law upon trustees to whom assignments have been made for the benefit of creditors."

Receivers then have by statute only the same power with respect to the statutory liability of stockholders as trustees to whom assignments have been made for the benefit of creditors—and in the case of *Wright et al. v. McCormick et al.* (17 O. St., 86) expressly hold that such trustee has no authority or control over that liability, but that it is collateral and conditional to the principal obligation which rests on the creditors and is to be resorted to by the conditions only in case of the insolvency of the corporation or when payment cannot be enforced against it by the ordinary process. It is a security provided by law for the exclusive benefit of creditors over which the corporate authorities can have no control.

The rights of the receiver are limited to the estate, real and personal, of the corporation of which alone they are trustees. As to that estate they act for the creditors and for the stockholders. No authority is given them to act for the creditors as to anything else.

The plaintiff cites the case of *Story v. Furman*, 25 N. Y., 214. That was a case based upon a local statute for the county of Herkimer passed April 16, 1852, in which authority was given the receiver to collect the personal liability of the stockholders and the principal question in that case was whether that act was constitutional. The judge (Smith) expressly states the general doctrine in that state, the law with respect to personal liability of stockholders being substantially the same as ours, to be that the receiver cannot maintain such an action. So far as that case is authority in this case it is against the plaintiff.

The demurrer must be sustained.

Baldwin & Ford, for demurrer.

Robison & White, *contra*.

**\*JUDICIAL SALES—TAXES.**

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[Cuyahoga Common Pleas, November Term, 1879.]

**JAMES M. FRENCH v. J. B. MCCONNELL ET AL.**

Where property has been forfeited to the state the taxes due at time of forfeiture and which have since accrued, are payable out of the proceeds of the sale, as the title to the property is in the state merely as security for taxes due and owing, and the forfeiture of itself does not pay the tax due the public.

**BARBER, J.**

This case is before the court on a motion to pay taxes out of proceeds of sale of lands.

The lands in question pending proceedings to sell were offered for sale at delinquent tax, not sold for want of bidders—and were thereby forfeited to the state. No sale has been made of the forfeited lands, but they stand on the duplicate in the name of the state, with the taxes charged thereon, subject to be redeemed by the former owner, and on failure to be so redeemed to be sold in the name of the state for those delinquent and all subsequent taxes.

If the lands had not been forfeited to the state, but stood in the duplicate charged with these taxes, although delinquent, it is conceded and cannot be questioned, that the taxes should be paid out of the proceeds of the sale under the last clause of section 77 of the tax law, S. & C., 1465.

The only question to be decided on this motion is: Does the forfeiture to the state change the character of the charge on this land for taxes so that it is no longer taxes—so that the proceeds of the sale cannot be applied to its payment?

The subject of the application of payment of taxes out of proceeds of sale was before the supreme court in *Ketchum v. Fetches*, 13 O. St., 201. The effect of that decision is that while the charge against the land for taxes remains as a debt due to the public and unsatisfied upon the tax duplicates, it is a tax to be paid under section 77 out of the proceeds of the judicial sale, but the taxes have been paid to the public and the lien therefor transferred to a purchaser at tax sale, the claim did not longer exist as a tax.

Does the forfeiture pay the tax to the public? The law does not so treat it. 75 O. D., 497, section 1, requires all such lands to be preserved on the duplicates until sold or redeemed, and the taxes thereon to be regularly assessed in the name of the state.

And section 2 provides that the former owner may, at any time before the state shall have disposed of such land, "pay all the taxes and penalties due thereon at the time of the forfeiture, and the accrued taxes—and then the auditor shall transfer the land on the duplicate from the state to the former owners." If the taxes and penalties are not paid the 4th, 5th, 6th, 7th and 8th sections provide

†See also 1 Cleve. 187.

for the sale of lands "to satisfy *such taxes and penalties*." If by forfeiture to the state the taxes are paid the charge of the public against the land for the taxes would be satisfied; but section 6 expressly provides that the lands shall be exposed for sale *in order to satisfy said taxes and penalties*. If there could be any doubt on the question the supreme court in *N. Sherwin v. Lessee of Slocum*, 16 O., 519, define the purpose and effect of a forfeiture to the state. The court, in the opinion, says: "The legislature has never treated this forfeiture as vesting the title in the state for any other purpose than as security for taxes due and owing."

Motion granted and the taxes and penalties ordered to be paid out of the proceeds of the sale:

Gilbert & Johnson, for Plaintiff.

J. J. Carran and J. M. Jones, for Defendant.

### AGENCY.

[Cuyahoga Common Pleas, November Term, 1879.]

THOMAS KILFOYL v. E. R. HULL.

Where an agent is sent out to paint sign on building, conditioned that he first get the proper authority; *Held*, that such agency is special, and therefore the principal is not liable to any owner if the agent only got leave from the tenant to paint such signs upon the buildings of the landlord.

Charge of HAMILTON, J.:

GENTLEMEN OF THE JURY:—This is an action brought by the plaintiff, Thomas Kilfoyl, against E. R. Hull, defendant, in which the plaintiff in substance alleges that at the time of the commission of the grievances alleged in the petition, the plaintiff was  
 370 \*the owner of a large lot of land, to-wit: about fifty acres situated on the St. Clair road, in the township of Euclid, in this county and state, and still continues to be such owner. That upon said lands there were certain barns situated, which he describes as being about forty feet in length by twenty feet in width, substantially built and painted.

He also avers that the defendant was at that time a wholesale and retail dealer in ready-made clothing in this city, doing business on Ontario street, and that on or about the 15th day of May, 1877, the defendant, without the knowledge or consent of the plaintiff, entered within the close and upon the said premises of the plaintiff, and then and there, without the knowledge or consent of the plaintiff, wrongfully and unlawfully disfigured and defaced the said barn of plaintiff by covering one entire side of said barn with paint of a different color from the rest of said barn, and then and there wrongfully and unlawfully did paint, print and mark upon, and affix to said barn, without the consent of said plaintiff, the owner thereof,

the words, letters and figures referring to and advertising said business of defendant, to the damage of the plaintiff in the sum of one hundred dollars, for which he asks judgment against said defendant.

The defendant, by way of answer, denies each and every allegation set forth in the fourth paragraph of said answer, which avers the gist of this offense, to-wit; the entering upon the premises and unlawfully painting on this barn as alleged.

He then sets out as a first defense that the barn was located upon certain premises, which was at the time of the alleged grievance in the possession of one Black as tenant of this plaintiff; that at the time the plaintiff had no possession of it himself, and that he has not had since. On the contrary, this tenant was, and has been since, in the full and exclusive possession of said barn and farm as tenant of the plaintiff from year to year, which said tenancy does not expire until on or about the 1st day of April, 1878.

For a second defense he sets out that on or about the 15th day of May, 1877, the defendant's agent, who was sent out by the plaintiff with express instructions to paint bills upon such barns only as he could obtain due permission of those having the same in charge. He applied to one Black, who then had full and exclusive control of the barn as well as the farm, for permission to paint the name of "E. R. Hull's One Price Clothing Store" on one side of the barn; that that permission was given by the tenant, and in pursuance of that permission he so placed these words, letters and painting upon the barn, and that this is the grievance complained of in the petition.

Thirdly, he says again that the said Black was in full and exclusive possession of said barn and farm as said tenant, and that said tenancy was from year to year, states when it expires, and that the defendant's agent requested of Black permission to so place this painting upon the barn, and that the agent then supposed that said tenant was the owner of said barn and farm; and that said tenant gave full and complete assent and authority to paint these letters, and that the plaintiff and defendant knew nothing of the transaction until several days afterward.

Now, the issues presented by these pleadings are what you are sworn to determine upon the evidence that has been given to you, and under such instructions as to the law of the case as shall be given you by the court.

This action was commenced, it appears from the pleadings, before a justice originally, as an action of trespass, it being undoubtedly good law that a justice of the peace would have no jurisdiction of this action in any other form. That is to say, what would have been an old action on the case for damages for this reversionary interest of the plaintiff could not be tried before a justice of the peace. That case was tried below and appealed to this court. A declaration, or a petition as it is now termed, was then framed and

filed in this court by the plaintiff, in which he sets out the averments which I have already enumerated, and claims damages.

I do not discover in the petition any averment that the plaintiff was in possession of the premises at the time of the alleged grievances. I do not think that the case as presented in the petition, and there made, makes a case of trespass. In the case as presented in the petition issue was taken by the defendant. I am of the opinion that whether or not this case could have been disposed of had proper remedy been pursued, it being a case not appealable to this court or not triable in this court as an action on the case as already stated, that having taken issue upon this question, the issues thus made by these pleadings are now to be tried irrespective of any question of whether they are properly here on appeal or not. I therefore say to you that this action as it is now before you is not an action of trespass. If it was it could not be maintained in this court for a moment—that is, I mean an action of trespass for breaking and entering the close. It is not such an action. If it were, then the owner of the fee of that farm and barn, not being in possession, could not maintain such an action. But I am of the opinion that he can maintain an action for an injury of a permanent character to his reversionary interest in that farm, if such injury has occurred as averred in the petition.

I may, in passing upon this point, so that I may not recur to it again, say to you that in any event, whatever may be your finding in this case upon other points, if you should come to the conclusion at any time that there should be a recovery here in favor of this plaintiff, that he cannot recover for any damages which he has sustained, or claims to have sustained, if said claim be made for any entry and violation of the possession of these premises. The possession was not his; the right of possession was not his; it was in the tenant. He had no right to enter upon those premises, without the consent of the tenant, for the purpose of putting up such a sign or authorizing such a sign to be put up. Now, therefore, I say to you that for any damages, or supposed damages, if such be claimed in this case, for a trespass in breaking into the close—going upon the premises itself—for that act with the act itself of putting it on except as consequential damages may have resulted to this remaining interest of his he cannot recover. So that you will lay aside all considerations of that kind from your verdict in any event.

Now, was there any injury in this case to this plaintiff's reversionary interest? To constitute such an injury it must be permanent in its character. By that word "permanent" I mean that you shall understand something of an enduring character—taking the word in its ordinary acceptance, that you shall be able to say that the act that was done there upon that barn, was of such a lasting character as to affect his reversionary interest to injure it. If it was of a mere temporary character, such as placing or hanging a sign upon the barn that could be taken down without any injury to anybody, it would be no injury to that reversionary interest



of this plaintiff. If, however, it was of such a character that its effects would exist after the termination of the tenancy and \*affected its value at the time it was done so that if it had to be sold it would have to be sold for less than it would otherwise sell for, then it was such a consequential injury to that reversionary interest, other things concur permitting it, he may recover or should recover to the extent as you are convinced by this injury that he has suffered damage. 371

Now, look at the testimony. What injury has he sustained in view of the evidence narrated here? What injury do you say this reversionary interest has sustained? Has he lost anything by it? If he has he should be made good provided the facts, as applied to the law that shall be further on given to you, will warrant a recovery at all.

To get at the foundation of this action, and as a starting point, you will inquire, was this thing done? Perhaps there is not much controversy upon that from the evidence. Secondly, under what circumstances was it done, and who did it? Did this defendant do it, or did somebody do it for whose acts this defendant is responsible? Now, I say to you that, in my judgment, the character of this agency was special; that he was authorized, having been a clerk in the store heretofore, to go out to do a special thing, to wit: put up these signs—was sent out a few days to do that. There is no dispute upon that point.

He was sent out, it is claimed, with specific instructions. It is said that these instructions were general, that at the time that he went out to do this work he had no special instructions, but that he had received his instructions a few days before when he went out to do similar work; which instructions continued in force, and under which, it is claimed, this agent was acting. It is said that his instructions were that he was to put up signs in the manner indicated as being put up here, upon getting proper authority for doing so.

It is further said that he was to get proper authority, or, as it is claimed by this plaintiff, he was authorized to do so by this defendant if he got the permission of the party, or the occupant or party in charge of the premises.

Now, that is a question for you to determine, what were his instructions. And I say to you as a matter of law, this agency, being of the special character which I have named, if he went outside of his authority, and put signs upon this barn without having complied with the instructions given him by his principal before doing so, his act was unauthorized by his principal, and for such act his principal is not responsible. In other words, I state it to be a general proposition, that if the agent does that which he is not authorized to do in the execution of a special agency, where the agency is not general in its character, and where he has no general power to act for his principal, I say in such case where he does the act outside of the authority of his principal, then it is not the act of the principal, but is the act of the agent, and for that act of the

agent, or of the party doing it, the principal is not responsible. It is no more, in my judgment, than if a party doing an act for one of you as your agent; you authorize him to do something—go from here to some other point and execute something, and while going there he steps out of his course and commits an assault and battery upon some one driving a wagon, or otherwise commits a willful, intentional assault, the act of the agent is not the act of the principal.

Now, what are the facts in this case? Was he to get proper authority, or was he to get simply the permission of the party in charge and was that to be sufficient? If the authority was that he was to get proper authority, those were the instructions, and he did not get the authority of the owner, for instance, of these premises, as that word will hereafter be defined to you, then he was acting without the authority of the principal, and the principal would not be responsible for his acts. But if his instructions were simply to get the authority of any man whom he might find in charge of those premises, and that that should be sufficient for his guidance, and he then might proceed and put the signs on the barn and he did that, then for that action the principal would be responsible. That is to say, the agent would be acting for, instead of and in place of his principal. But the effect of having so acted is to be further discussed before finishing the case. That is the effect of getting consent for the agent to do it.

Upon that branch of the case I simply say to you now that there seems to have been considerable conflict in the holdings of the different branches of this court, as to whether the tenant being in possession of those premises could give consent for the owner, or whether or not he was the owner of the premises at the time, it being contended on the part of the defendant in this case that the tenant in such case is the owner to all intents and purposes, being in possession of the premises.

Mr. Gary—He is only claimed to be the owner within the meaning of the statute.

The Court—I will say it is contended within the meaning of this statute he was the owner and had authority to give consent. Upon that branch of the subject I may say this, that if this was a criminal prosecution it might be urged with a good deal of force that the tenant would be the owner within the meaning of that statute, and that statute is passed for no other purpose, apparently, than to punish somebody for a violation of it. It is a criminal statute in its nature.

My own ideas of this case are that that statute does not control this action. Where the language of the statute is given at all it characterizes the act as criminal in its nature if done. But suppose there had been no such statute. I apprehend that a remedy would still exist for a violation of the rights of the owner of the premises, and it does not depend upon that statute for the right of recovery in this case. Now, while this opinion, as I am informed,

is not in consonance with the opinion of one branch of this court for whose opinion I entertain the profoundest respect, and hesitate when I find myself not concurring with it. Yet there is the opinion of two branches of the court already varying upon this same proposition, as I am informed. I do not understand that the case has been decided in the district court practically upon this feature of it. Therefore, we have no finding or holding of the district court upon that subject. But I am of the opinion, and shall give it to you as the law of this case, that a tenant in possession from year to year has no authority himself to injure the reversionary interest of the landlord, and having no authority himself he cannot depute authority to any one else to so injure it.

It seems to me that if one of you gentlemen should rent a house, and within a day or two, or a week or two, or a month or two before the expiration of your tenancy, some one should come along and desire to put an advertisement upon the front of that house, covering it, and you stand by and say, "Yes, you may do so. I don't care whether you do it or not. I am going out within a day or two," and thus authorize it in terms, and it effects an injury that is permanent in its character, goes over onto the reversionary interest of the owner, that tenant in that case would be a joint \*wrong-doer, and the remedy would lie against both or either. 372

The burden of proof in this case rests upon the plaintiff to establish affirmatively every material averment in the petition by proof before the plaintiff can recover. The burden is on him to show that the act was done without his consent, and that it was a wrongful act without his authority.

Now, I am requested to say something about the measure of damages in case there should be a recovery in this case. I say to you that the measure of damages is what this plaintiff's loss was in the premises. If he suffered no injury then he is not entitled to any damage at your hands. You must gather this from the evidence in the case, what loss, what damage it has been to him. If he has suffered such damage, if you are satisfied of it from all the evidence, and facts and circumstances in the case, then say by your verdict what it was in case you find for the plaintiff under the instructions already given.

E. M. Brown, for plaintiff.

M. B. Gary, for defendant.

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**\* ADMINISTRATOR—VENUE.**

377

[Cuyahoga Common Pleas, November Term, 1879.]

M. H. STEEL ET AL. V. JAMES H. BURGERT ET AL.

1. Where an action is commenced in a county in which one of several defendants resides, one of the defendants being an administrator who was appointed, and, at the time of the commencement of the action, resided in a

county other than that in which the action is brought, the same being upon a tort alleged to have been committed by the intestate in his lifetime jointly with the other defendants, summons against such administrator may issue to the county in which he resides.

2. Section 10, chapter 5, 75 O. L., 611, does not exempt an administrator from being compelled to answer an action rightly brought in any other county than that wherein he was appointed or resides.—[ED. LAW REPORTER.]

BARBER, J.

This action is brought against Jas. H. Burgert, Amos Burgert and Adam Burgert as administrators of David Burgert, deceased. The petition represents that James H. Amos, and David Burgert in the lifetime of David Burgert were partners doing business in the city of Cleveland under the name of D. Burgert & Sons. Fourteen causes of action were set up, all of the same character, charging certain fraudulent transactions against the members of said firm in their firm transactions, whereby the defendants became indebted to the plaintiffs in a large sum of money—about \$4,000. Summons appears to have been served on James H. Burgert in this county and on the other two defendants in Lucas county.

Adam Burgert answers only for the purpose of pleading to the jurisdiction of this court as to him as administrator. He says that his intestate at the time of his decease resided in Lucas county, and after his decease he was appointed administrator of his estate by the probate court of Lucas county and he is still acting under said appointment as sole administrator of said estate. That he then and ever since then has resided in said county of Lucas, and that the summons in this action was served upon him in the county of Lucas, and he claims that this court has not thereby acquired jurisdiction over him or over the subject matter of the action as to him.

To this answer the plaintiff replies that his co-defendant, James H. Burgert, was and is a resident of Cuyahoga county and personally served therein. To this reply this demurrer is filed.

The defendant makes the following points in his brief. He says:

"1st. The administrator of an estate, being administered in Ohio, can only be sued as such, in either the county of his residence, or of his appointment. (See O. L., 1875, vol. 75, \*601, 1, div. 378 2, chap. 5, sec's. 1 to 10 inclusive. Seney's code, sec. 53. Same 70 O. L., 138, passed April 18, 1873, S. and C. code, sec. 53.)

From the foregoing it appears that the exception as to the *place of suit* against the administrator, found in vol. 75 (1878) O. L., 610, 1, sec. 10, was first enacted in 1873, (O. L., 70, vol. 138), and thence carried into the codification of 1878.

Prior to that time the administrator might be compelled to answer anywhere, the same as any other unincorporated defendant.

2d. The ground on which it is insisted the jurisdiction over Adam Burgert, administrator, is maintained, is that appearing in O. L., vol. 75 (1878) p. 607, sec's. 14 and 17, providing for joinder of defendants in certain cases. An examination of these sections shows that they are neither of them applicable.

a. The first section (14) relates to cases in the nature of chancery.

b. The second section (17) relates to cases where the liability is several on an instrument in writing.

3d. There is no warrant for the issuing and serving of summons, on this or any other of the defendants, outside of the county of Cuyahoga. The liability is not on an instrument. Sec. 4, chap. 6 div. 2, O. L., 1878, 613, gives the only cases, by reason of joint liability, in which summons may issue to and be served in another county. Sec. 38, code changed, O. L., 1878, 607, sec. 17, omitting the word "obligation," leaving only "instrument."

4th. The provisions of sec. 10, chap. 5, div. 2, O. L., 1878, provide for bringing to either to the county of the residence or appointment, of any other properly joined defendant.

The wisdom of the change in 1878, doubtless rests in the wish to protect the estate from the expense of defending litigation; in any and every county, where the administrator could be served, or a co-obligor could be served with summons.

5th. The provisions of the amendment of 1878 (70 O. L., 138) are *restrictive* and not merely enabling and enlarging. Before that enactment the administrator could be sued in any county in which any other natural person could be sued.

It cannot be claimed that the intention in the amendment was to continue that liability, and also to make the administrator amenable to suit, in addition, in the county of his appointment, the domicile of his decedent. If so, he and the guardian or trustee might be sued in more places in the state than any other natural person.

The intention, we think, was to leave it, the jurisdiction to the two counties, that of residence and appointment.

The maxim, *Expressio unius est exclusio alterius*," is applicable

The plaintiff maintains that the exception in section 10 referred to is enlarging and not restrictive; that it adds to the places where the administrator may be sued the county of his residence and the county wherein he was appointed.

The place where the action may be brought, so far as the demurring defendant is concerned, depends upon the question whether he is properly joined as a defendant in the action as well as the construction of section 10. (*Drea v. Carrington et al.*, 32 O. S., 595). In actions for torts the plaintiff has a right of action against all the joint tortfeasors either jointly or severally. He may at his election maintain his action against them all or against any of them. This doctrine is as old as the law and needs no citations in its support. It does not depend upon sections 14 or 17 of chapter 3, of the revised code, nor did it depend upon the provisions of sections 35 or 38 of the old code. Those provisions were inserted in the code to provide for joining parties as defendants against whom a joint cause of action did not exist at common law. So those sections have no

application in the settlement of this question. David Burgert, if he had lived, would be jointly liable to be sued in this action with his co-defendants for the fraud charged to have been committed by them jointly. And where he would have been a proper party if living, his administrator is a proper party after his death.

The next question raised by the demurrer is, can the administrator, when he is a proper party defendant, be sued in any county other than his residence or where he is appointed, when one of his co-defendants resides and is served in the county where the action is brought? The statutory provision on this subject is section 10, chapter 5, 75 O. L., 611, which reads as follows: "Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian or trustee, which may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county."

This exception was first introduced into the code by the act of April 18, 1873, (70 O. L., 138), and the defendant concedes that prior to that an administrator might be sued and summoned the same as any other party—but he claims that that exception now exempts him from being compelled to answer an action brought in any other county than that wherein he was appointed or resides. Is that a fair construction of section 10?

The first part of the section is restrictive. An action cannot be brought in any county. The place of bringing the action is limited to the counties in which a defendant resides or may be summoned. It can be brought in no other. This applies to all actions except those provided for in the preceding sections of chapter 5, and to all defendants. The exception comes into this restriction. It is an exception to a restrictive act and provides that the actions covered by this section, when administrators, executors, guardians or trustees are properly made defendants, may be brought, notwithstanding the restriction in the first part of the section, in the county wherein such party was appointed or resides. The action is properly brought in this county. One of the defendants having been served here and under the provisions of section 4, chapter 10, 75 O. L., 613, the summons could be and was rightfully issued to Lucas county and there served on the other defendants.

The demurrer is therefore overruled.

J. G. Pomerene and Charles E. Pennewell, for plaintiffs.

J. C. Lee, for defendants.

## \* VACATION OF LEVY.

379

[Cuyahoga Common Pleas, November Term, 1879.]

GEORGE H. WOOSTER, ASSIGNEE, v. LEWIS SCHAAF.

Where a petition in error was filed in the supreme court, but no supersedeas bond given, afterwards action was begun before a justice on an appeal bond taken in the same case before the magistrate: *Held*, that such a bond afterwards given, operated on the case and if judgment has been rendered by the justice refusing to recognize the stay, and a transcript for execution filed, the court of common pleas can vacate the levy and order a stay of proceedings.

BARBER, J.

This case is before the court on a motion to require the return of an execution which it is alleged was wrongfully issued.

The facts on which the motion is based, and about which there is no dispute, are of record—and as follows:

The plaintiff recovered a judgment against one C. B. Clark before a justice of the peace. The defendant in this action became his surety on a bond for appeal to the court of common pleas. In the common pleas on appeal a judgment was again rendered in favor of the plaintiff. Proceedings in error were instituted in the district court to reverse that judgment and a supersedeas bond \*filed. In the district court the judgment of the common pleas court was affirmed. Exceptions were taken and a petition in error filed in the supreme court, where the case is now pending. 379

After the filing of the petition in error in the supreme court and before the filing of a supersedeas bond, this action was commenced by the plaintiff in that action in the justice's court against the surety on the bond for appeal filed in the justice's court. The case went to trial. On the same day, and while the trial was proceeding, the defendant Clark in the error proceedings in the supreme court filed in the proper court a supersedeas bond to stay proceedings to collect the judgment against him. After the argument was concluded and before the jury was charged a motion was made by the defendant Schaaf to have the case taken from the jury and dismissed, and in support of the motion, filed with the justice a certificate from the clerk of the court showing that a supersedeas bond had been filed.

The justice overruled the motion to dismiss the action and entered upon his docket a statement that the case should proceed to verdict and judgment, but no further proceedings could be had in the case until a mandate should be received from the supreme court. A verdict was rendered for plaintiff and judgment rendered thereon. No further proceedings were had before the justice's court—but the plaintiff took a transcript and filed it with the clerk of the court of common pleas, who entered it upon the lien docket—and thereupon on the precept of plaintiff an execution was issued, to collect the judgment, and a levy was made on the personal goods and chattels

of the defendant. This motion is to set aside that levy and order the return of the execution. Two objections are made to its being granted. First, that this court has no authority to act in the premises. That the duties of the clerk and sheriff are merely ministerial—regulated by law and not under the control of the court. Second that the supersedeas bond did not operate on this judgment. Held, 1st, The court has jurisdiction over an execution issued upon its judgment and the proceedings under it, and may, if it is wrongfully issued, set aside a levy made under it and order its return. It has been so held by Judge Prentiss of this court, and there are numerous authorities in its support.

Boyle v. Zachariac & Trimm, 6 Peters, 648. Herman on Executions, section 403, and cases there cited.

2. There can be no doubt but that the supersedeas bond did operate on this case. It is not disputed but that it operated on the case of Wooster, assignee, v. C. B. Clark. This proceeding is only another mode of collecting that judgment. If this judgment should be collected and the supreme court should reverse the case pending there the fruits of that decision of the supreme court would be lost to the parties entitled to the benefit thereof.

The entry on the justice's docket was substantially a stay of proceedings and it was not vacated by filing it in this court. The execution was wrongfully issued. The levy is therefore vacated and the execution ordered to be returned, and all further proceedings stayed until the proper mandate is received from the supreme court.

Ball & Reynolds, for plaintiff.

Marvin, Laird & Caldwell, for defendant.

## 385

**\*STREET ASSESSMENTS.**

[Cuyahoga Common Pleas, May Term, 1879.]

**HILL V. CITY OF CLEVELAND.**

In a levy for an assessment according to benefits for improving a street, it being claimed that the estimating and equalizing boards never made any appraisement of benefits but proceeded arbitrarily to assess the lots, the presumption, in the absence of anything in the record of the proceedings to the contrary, that these boards did their duty, does not obtain as to matters which they were not required to do. And where the records do not disclose that the essential things were done cannot be shown by parol.

BARBER, J.

On June 16, 1874, an ordinance was passed by the city council of this city to open and widen St. Clair street from Wilson avenue to Crawford road, and in the ordinance the intention is declared to appropriate land from the lots on the south side of the street to make it from a sixty feet to a ninety feet street.



Appropriative proceedings were had and damages awarded to the amount of \$52,012.18—costs \$560.29.

The city took the land and paid the damages awarded.

February 22, 1875, a resolution was passed directing the board of improvements to make an estimated assessment to pay the afore-said damages.

April 6, 1875, the board of improvements made and reported an estimated assessment.

June 18, 1875, referred to a board of equalization, and on June 29, 1875, estimated assessment made and reported, amount \$66.74 26-100.

November 5, 1875, the report of the equalizing board was adopted and confirmed.

May 9th an ordinance was passed to make the levy and assessment by installments.

1. Levy not made to pay costs of improvement when bonds have been issued. No bonds were issued on the faith of the levy. The city paid the damages, etc., out of a general issue of bonds to be paid for by a general tax.

2. Having issued bonds as said in 1, the council afterwards levied to pay the bonds so issued, and the ordinance is void. It does not specify how much or what tax is to be levied, nor upon what lands, nor amount to be paid annually, nor whether to be levied by foot front or per value.

The clerk certified \$66,949.26 as the amount to be levied, one-third of it each year, to auditor.

That he has added it to the general tax, state, county, etc., and refuses to take any unless all is paid.

Sixteen different plaintiffs present their several grievances.

Amendment to the petition. That the city pretended to make the levy according to *benefits*, but the boards of assessment (estimating and equalizing) never made any appraisal of benefits to the lands of petitioners but proceeded arbitrarily to assess upon these lots described the tax mentioned in the petition, which was made payable in three installments.

This they say was illegal and they pray for an injunction and relief.

The answer to the amended petition admits that the assessment was made payable in three installments, and that all of the installments have been certified to the county auditor and by him placed on the duplicate and passed over to the treasurer for collection, but denies everything else and says: 1. The plaintiffs are estopped because they petitioned for the improvement, and because they have lain by for years until the city has issued its bonds and paid the expense—without testing the invalidity of the levy or that it was made on a wrong basis.

2. That the interest included in the levy is too small by several thousand dollars.

The only question now presented to the court is, will the court

hear evidence as to whether or not the estimating board did or did not estimate the benefits to the property adjacent, continuous or abutting, and if so proportion it to the several owners in the proportion the benefits to each sustains to the whole benefit.

The city claims that it must be presumed that this board did its duty according to law, and that in pursuance of that duty they did properly estimate and apportion the benefits, and report the assessment accordingly, and that this presumption must prevail until the contrary may be made to appear by proof, and that if plaintiffs claim no such estimate and apportionment was made the burden of proof is \*on them to establish it. The plaintiffs claim no such  
386 presumption exists.

On this subject the supreme court say in *Chamberlain v. City of Cleveland*, 34 O. S., ¶ 3 of the syllabus, "Where the proceedings in an appropriation assessment on the principle of special benefits, merely show upon their face that the aggregate amount of the assessment is placed on benefited property it will not be conclusively presumed that the assessment is limited to special benefits conferred or that it has been properly apportioned amongst the several lots or lands assessed."

The judge in rendering the opinion of the court on this subject says the city council resolved that the board of improvements be required to prepare an estimated assessment as required by law, of the costs and expenses incurred, etc., and report to the council.

The board is not (by that resolution) required to estimate and assess the value of the special benefits conferred which may or may not have been equal to the cost of the improvement but to prepare an estimated assessment of the costs and expenses, etc.

Afterwards the board submitted an estimated assessment *upon the property benefited* to pay the costs and expenses incurred in opening and extending Bond street.

This assessment \* \* is without caption and conclusion. It locates the lots and describes them by their numbers and otherwise; gives their frontage, the rate per foot front of the assessment, and the amount assessed on each lot, and the aggregate amount assessed on all the lots \* \* \*

There is nothing in all this to show that the special benefits conferred were valued at all, or if valued to show that the assessment was apportioned in proportion to the special benefits that each lot received. The only thing to indicate that benefits were conferred at all is found in the report of the assessing board, that the assessment is "upon the property 'benefited.'" But this of itself is of no effect. It lacks the essential elements of valuation and apportionment above spoken of, without which the assessment may be arbitrary and oppressive. Presumption, if permitted in favor of the validity of any part of the proceeding, cannot be permitted to supply the essential elements of a valid assessment that are wanting here.

It is claimed that this part of the opinion is in conflict with, or

at least not supported by the syllabus, and is therefore not authoritative. It is appropriate therefore to look into the question of presumption in favor of public officers and see how far it is applicable to the proceeding by assessing boards acting under the authority of municipal corporations.

The statute law requires the council of a municipal corporation to keep a journal of its proceedings (Municipal Code, section 88.) Section 104 requires its resolutions and ordinances as well as by-laws to be recorded, and further provides that printed copies, transcripts from its records and journal and certified by its clerk, shall be received in evidence same as the originals, etc.

It is evident that these records are proper evidence of what they contain and the proceedings of which they purport to be a record, minute or journal.

And as to all matters that the statute requires to be entered in the records, they are the only evidence that can be offered to show that such action was taken.

As to everything else, all other actions of the council or authorities as officers of the city or its agents, parol proof may be heard when the record is silent, or when the record speaks it may be contradicted.

Section 100 provides that all by-laws, resolutions and ordinances shall be recorded, etc.

The board of improvements have the supervision of all the work upon the streets, including improvements.

This board has an organization of its own. They may have a clerk and are required to keep a complete journal of all their proceedings.

The duty of making the estimated assessment to pay costs and expenses of land taken for public improvements is not devolved by law upon the board of improvements, but by requirement of the council—section 584—therefore, when they act as an assessing committee they act for the council, and of their proceeding as such committee they are not required to keep a record. They are required to report their proceedings in that respect to the council—this report must be in writing, and a copy filed with the clerk for the inspection of all persons interested. Notice is required to be given, and if objection is made, an equalizing board is to be appointed and it is made the duty of this board to equalize the estimated assessment already made. They cannot extend the assessment to other lands not included in the report of the estimating committee or board. *Glenn v. Waddell*, 23 O. St., 605. Nor can they add anything to the amount originally assessed, except for their own fees—*Chamberlain v. Cleveland*, 34 O. St., but their duty is limited to an equalization of the assessment already made. The board of improvements or estimating committee are required to make the assessment according to the benefits. The statute does not require them to keep any record of their proceedings as an assessing board, except that their report must be in writing.

Now, if this report is silent as to any material part of what they are required to do as such assessing board, can that omission be supplied by parol evidence?

In the case before us the resolution of the city council directing the board of improvement to make and report an estimated assessment is not set out in *haec verba*.

The language of the petition is that "a resolution was passed by the city council directing the board of improvements, to make an estimated assessment of a special tax to pay the aforesaid damages awarded to the land owners and costs of said proceedings, and report the same to the council." What the terms of the resolution are does not appear, but we are to presume, in the absence of more definite information, that it was correct in form and required the board to make such an estimated assessment as the law required, which would be an estimated assessment of the benefits specially accruing to the property benefited by it. So that, with this presumption, no fault can be found with the proceedings of the council as to their proceedings so far. The next step is the proceedings of the board of improvements in making the estimated assessment. It is averred in the amendment to the petition that the board did not make an estimated assessment of the benefits or apportion it on the land, but did make an assessment of the whole damages and costs upon the land, and this is denied in the answer.

That report is not before the court, but it is conceded that it does not show him the assessment was made. It does not show that it was an assessment and apportionment, but it is claimed for the city that, although the report does not show that fact, it must be presumed in favor of the board and their proceedings that the estimated assessment which they, in fact, did make, and such as was legal for them to make, and even if such presumption does not follow, they **387** may \*show by parol that the assessment was made as the law requires. The presumption is denied, and, it is claimed that the defect cannot be supplied by parol proof. Even if the report showed that their proceedings were proper, and such as the law requires, parol proof may be heard to show that the board did not, in fact, estimate and apportion the benefits. *Chamberlain v. Cleveland*, 34 O. St. If the resolution requiring the board of improvements was in proper form and substance, and the report of the board was in substance as in the *Chamberlain* case, (*supra*) I think the presumption follows, that whatever the board did in the matter, was done in pursuance of the resolution, and according to law, and the inference would be clear that the assessment reported was an estimate and apportionment of the benefits.

The taxpayer, by going to the records after publication of the notice, would see by the resolutions what the board was required to do and their report would show what they had done. He would thus be put in possession of all the facts necessary for him to know whether the tax was legal and just or not. If he claims that the board did not in fact estimate and apportion the benefits, he

must look for the information outside of the record, and the burden of proof would then be on him, and when his proof was offered it could be rebutted by *contra* proof on the part of the city.

But in this case I understand it is conceded that it is parallel with the Chamberlain case except the assessment was on the property fronting on the street, and was only for the amount of damages awarded to the property owners for land taken and for the costs of appropriation. If so, the resolution, instead of being in proper form and substance, is as follows: "That the board of improvements be and they are hereby required to prepare an estimated assessment *as required by law* of the costs and expenses incurred in the extension of St. Clair street, and report the same to this council."

And the report would show that the board had made an estimated assessment as required by the resolution on the property benefited. The thing the law required to be done was to estimate the special benefits which the improvement caused, and assess an amount of cost and expense equal to it upon all the property specially benefited by a proper apportionment among the several lots or lands according to the benefits secured by each. What they were required to do was to make an estimated assessment of the whole cost on the property benefited, and the claim is that it is now to be presumed that the board did in fact estimate and apportion the benefits.

The presumptions in favor of the action of the board are that the board did what they were required to do and that they did it according to law. The presumption then in this state of the case is that the board estimated and assessed the whole cost and expense on the property benefited. This presumption does not extend to anything outside of what they were required to do by the resolution and therefore does not extend to the estimating of the benefits and apportionment of the same. It is, in the opinion of the court, the duty of the city to show that these essential elements of the assessment were made part of their proceedings, and this can only be shown by their records. These essential elements not appearing in their record, I am of the opinion they cannot be supplied by parol proof. There is then nothing to be heard further in the case, and the injunction must be made perpetual, without prejudice, however, to the right of the city to make a new assessment.

Marvin, Hart & Squire, for plaintiff.

Heisley & Weh, for defendant.

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### FIXTURES—CHATTEL MORTGAGE.

[Cuyahoga Common Pleas, November Term, 1879.]

WINSLOW ET AL. v. HART, WILKINS ET AL.

1. Where a tenant expressly reserves a right to remove fixtures at the end of his term, all rent being paid, implied right, to make such removal is limited to the end of the term and the lessor's right to prevent removal until rent is paid is superior to a chattel mortgage.

2. Where the affidavit on an indemnity chattel mortgage does not state the amount, and the face of the mortgage does not show the amounts, and subsequent affidavit says "there is still due \$25,000 as within set forth" it is not in compliance with the statute.

JONES, J.

The plaintiffs in this case filed their petition in equity in this court December 27, 1875, to enjoin the defendants, Hart & Malone and Horace Wilkins, from removing certain alleged fixtures from plaintiff's building on Euclid avenue, this city. The plaintiffs say in their petition that they let and leased to Hart & Malone, from December, 1873, until December, 1879, the second, third and fourth stories of Euclid Avenue block for the sum of eleven thousand five hundred dollars per year, until 1879, and thereafter until 1889 for a price to be fixed by a method therein stated; that the lease contained the following provision, to-wit: "That at the expiration or termination of this lease the second party, their executors, administrators or assigns, on payment in full of the rents herein reserved, shall have the right to remove from said premises the heating and hoisting machinery, apparatus, fixtures and improvements which they may have put into or attached to said premises." That this lease was duly acknowledged and recorded as a lease, but not as a chattel mortgage, and that said defendants, Hart & Malone, duly entered upon said term in pursuance of said lease, and put into said building one steam engine, one boiler and the machinery connected therewith, an elevator, steam pipes and other fixtures for heating said building, also an office comprised of expensive cabinet work, counters, partitions, doors, etc., and that all these things were firmly attached to and made part of the real estate so leased; that on the 6th day of December, 1875, the said Hart & Malone, then owing plaintiffs over \$2,000, for rent due on said lease, and being largely insolvent, made an assignment under the state law for the benefit of their creditors; that the defendants now threaten to remove all these fixtures and deprive plaintiffs of their only security for the rent due as aforesaid, and they pray the court for an injunction to prevent this threatened removal.

Defendant Horace Wilkins is the only one who files an answer contesting the claims of the plaintiffs. He sets up therein that on the 15th day of October, 1874, Hart & Malone executed and delivered to him a chattel mortgage on the boiler, elevator and steam heating apparatus, and office fixtures aforesaid, to secure him against his liability on some \$25,000 worth of commercial paper as accommodation indorser for Hart & Malone; that he received the same without any knowledge of the plaintiff's claims in the premises, and on the 9th of November, 1874, having first fixed the affidavit required by law, duly filed it with the recorder of the county.

That on the 6th of November, 1875, he made oath to the amount due him and refiled the same in said office, and again in like manner did the same in 1876. He denies all allegations of the

plaintiff in regard to these alleged fixtures having become affixed to and a part of the realty.

The question in controversy here is, therefore, whether the plaintiffs are entitled to have these alleged fixtures by virtue of the facts proven on the trial in regard to them, and by virtue of the provision of the aforesaid lease, or whether the defendant Wilkins is better entitled to them by virtue of \*his said chattel mortgage, and the decision of this point largely depends on this question: What was the real nature of this property at the time of the execution of the chattel mortgage to Wilkins? 388

I think, from the testimony in the case, that all the articles mentioned in defendant's chattel mortgage were so attached to the realty that if they had been so placed there by the owner of the same, they would, in the absence of any agreement to the contrary, have constituted a part thereof, and have passed to a vendee of the real estate, but that being put there by the lessees for the special purposes of their business, they would ordinarily, in the absence of any restrictions, have had the right to sever and remove them at any time during their term; but this does not settle the question as to what is the character of such property while it remains attached to the realty and before the removal is made. It is not denied by the defendant Wilkins that the lease contained the stipulation as to removal set forth in the petition; but that stipulation is differently construed by the parties to this suit, the defendant insisting that it was merely intended to enlarge his right of removal of the alleged fixtures beyond his term on payment of the rent that might be due, while the plaintiffs insist that the provision was substantially a contract on the part of the lessees that the fixtures were to remain a part of the realty, and until the end of the term, and until the rent was all paid up. I do not understand that it is disputed by the parties that an agreement in regard to the status of the property, or for a lien on it, may be binding as between the parties themselves, but the defendant Wilkins insists that it is not binding on him as an innocent holder of the mortgage on the property in question, and he cites the 19th O. S., 145, in support of this principle. This case only decides that where a lease contained a provision that the lessee shall not remove property that was purely personal in its character until all rent paid, that a chattel mortgage on same property executed afterward by the lessee would take precedence over the landlord's claims in the lease. This was not a case where it appeared that the chattels were affixed to the realty. It is undoubtedly competent for a lessee to contract verbally or in writing that any and all fixtures he may annex to the property leased shall remain a part of the realty, and not be severed and removed by him; in such a case there can be no reasonable doubt that they would be a part of the realty from the time of annexation. So, also, if he stipulates in the lease that any fixtures he may put in shall not be removed until the expiration of his term, and until all rents are fully paid; in such a case I think the fixtures on being

annexed become part of the realty, without any right of severance or removal on the part of the lessee, until all rent is paid at the end of the term. The further contingency on which the right of removal depends may never happen, and in that case the fixtures would never cease to be part of the realty.

I hold that the provision of this lease virtually amounts to an agreement that the fixtures shall remain a part of the realty until the end of the term, and until all rents are paid.

And indeed in the absence of any stipulation restricting the right of removal, there is a strong line of authorities which hold that all fixtures while attached to the freehold are a part thereof.

In *Prescott v. Wells*, 3d Nevada, 82, the court says: "In my opinion all fixtures while attached to the freehold are for the time being a part of the realty; no contract can change their nature; a contract that may convert it into personalty at a future day does not make it so at the time of contract."

In the 15th Vermont, 129, Judge Redfield says: "All fixtures for the time being are a part of the freehold; the right to remove must be exercised during the term."

In 9th Grey, 115, Judge Grey says, in speaking of fixtures: "If annexed by a tenant for the purposes of trade, he may, during his term, sever them from the land, and thus change the character back again from realty to personalty."

In 3 Mason and Wellsby, 185, Judge Parke says, "that the tenant's fixtures are not chattels, but parcels of the freehold, and as such not recoverable in trover."

In *Guthry v. Jones*, 108 Mass., 194, it is said that "when fixtures have not been severed from the building they remain part of the building, and trover will not lie, even when defendant illegally refuses to permit them to be severed and removed."

See also 116 Mass., 172 B., 573; 17 Maine, 455; 31 Penn. State, 159.

It has been held by a long line of authorities that fixtures while annexed were not goods and chattels within the meaning of the English bankruptcy acts. *Elwell on Fixtures*, 333.

There are also abundant authorities to the point that by agreement between landlord and tenant the right to sever and remove fixtures may be waived, modified or extended. 14 Cal., 59; 7 Ind., 30; *Elwell on Fixtures*, 66; 38 N. Y. Law, 457.

(See also full authorities on this question in *American Law Register* for 1879.)

I hold then, on the whole, that the fixtures put in by Hart & Malone, became at once under the stipulations of the lease part of the freehold without any right on their part to sever or remove until the end of the lease, and that the plaintiff's rights thereto are superior to any rights that could be conveyed by Hart & Malone by the chattel mortgage made by them to Wilkins, even if the chattel mortgage were not defective in any respect, and had been duly verified and filed according to law.



The plaintiffs are therefore entitled to relief demanded. But I should arrive at the same conclusion by a careful examination into the validity of this chattel mortgage to Wilkins. He has no rights as against the plaintiffs unless his chattel mortgage is a good and valid one in law. The condition of said mortgage is "that whereas the said Horace Wilkins has indorsed for said Hart & Malone, and become liable for them on certain notes for their accommodation, and is about to indorse further for their accommodation, from time to time, their notes and commercial paper," and the mortgage provides that if Hart & Malone shall pay and save Wilkins harmless from the payment thereof the mortgage to be void. There is no statement anywhere in the body of this instrument as to the amount of the paper the mortgage was given to secure, nor the amount that had been indorsed as distinguished from the amount that was to be indorsed in the future.

Under the statute in reference to chattel mortgages, passed May 1, 1869, it is necessary for the validity of such instruments, if given for the security of money only, "that the mortgagee, before the filing of such instrument, \* \* \* shall enter thereon a true statement in dollars and cents of the amount of his claim, and that it is just and unpaid." And in case the said instrument shall have been given to indemnify the mortgagee against a liability as surety for the mortgage, or "he shall enter thereon a true statement of such liability, and that said instrument was taken in good faith to indemnify against any loss that may result therefrom which \*statement shall be verified," etc.

Let us see if defendant Wilkins complied with this law. 389  
On the 7th of November, before the original filing of his mortgage, an affidavit was placed by him thereon, which did not state in dollars and cents, nor did it give a true statement of his liability nor the amount thereof, and was manifestly and confessedly insufficient under the statute. But it is claimed that it was again filed on November 6, 1875, a month before this suit was begun, and a good affidavit attached and the former defect thus cured. The affidavit of Wilkins thus attached was as follows: "That there is still due him at this date from the within named mortgagors the sum of \$25,000 in manner and form as within set forth, and that the claim is just and unpaid." Now, when it is recollected that the face of the mortgage did not disclose the number of notes signed, the date or amount of any one of them, or the time of the maturity of any one, or the aggregate amount of the liability the mortgage was given to indemnify the surety for, it is clearly apparent that the affidavit was defective, and that the mortgagee did not enter thereon, as required by law, a true statement of his liability as surety for the mortgagors; nor, indeed, was there any statement of his liability for such mortgagors; for instead of giving a true statement of his liability to others for the mortgagors, he says there is due to him from the mortgagors \$25,000, as set forth in the mortgage. Now, no such thing is set forth in the mortgage, and for all that appears

therein, there may be no existing liability on his part on any of the papers signed, and there is certainly no averment that he has paid them or any of them, without which there would be nothing due to him from the mortgagors. Neither of these affidavits, then, being in accordance with the law, the chattel mortgage upon which Wilkins' rights depend is not valid as against any of the creditors of Hart & Malone, so that even if the plaintiff's rights are only equitable, they constitute an earlier equity than Wilkins has under his mortgage, and therefore the superior claim. A decree may be entered for plaintiff as claimed.

## \*STREET ASSESSMENTS.

[Cuyahoga Common Pleas, May Term, 1879.]

## †WAMELINK ET AL. V. THE CITY OF CLEVELAND.

The improvement of a street must be considered as petitioned for by three-fourths of the abutting owners, so as to allow an assessment of more than one quarter of the value of the property, although the petition therefor asks for an improvement by a pavement different from that adopted, as the council is not restricted to the kind of material asked for in the improvement.

BARBER, J.

This case is an application by Wamelink and numerous others to restrain the city from the collection of an assessment to pay the costs and expenses of paving Woodland avenue between East Madison avenue and Woodland Hills avenue—for the reason that the total amount of the assessment on each of the lots exceeds twenty-five one-hundredths of the value of the same after the improvement is made, and for the further reason that while the assessment is ordered to be made in five annual installments, to wit: First, for 1877, \$1.83 per foot; for 1878, \$1.43; 1879, \$1.35; 1880, \$1.27 per foot front, that the amount so levied for each year exceeds ten per cent. of the value of the several lots after the improvement is made, in violation of section 543 of the municipal code.

The defense sought to be made by the city is that notwithstanding the assessment and the said levies exceed the statutory limitations prescribed by section 543, yet three-fourths in interest represented by the feet front, of the owners of the property abutting upon said street, petitioned for the improvement in accordance with the third provision to section 543 of the municipal code.

The reply denies that three-fourths of the owners, in accordance with the proviso, petitioned for the improvement.

It is conceded on both sides that if three-fourths of the owners

†Affirmed by supreme court, 40 O. S., 381.

petitioned for the improvement, no objection exists as to the assessment, and the petition should be dismissed. If on the other hand it should appear that three-fourths of the owners did not petition, the assessment above twenty-five per cent. of the value of the lots after the improvement was made, and the excess of each yearly levy above ten per cent. of the same value, is excessive, and should be enjoined; and in that case the court is to proceed and hear testimony as to the value of the property after the improvement was made.

Two petitions are put in evidence as follows. One reads as follows: "To the Honorable City Council and Board of Improvements. Gentlemen—We the undersigned, property owners on Woodland avenue between Madison avenue and Woodland Hills avenue, petition your honorable body to cause said avenue to be paved with not less than thirty-two feet wood center, treated with the Thilmany process, and the balance stone, because it is very probable that a street railroad track will be laid on said avenue and in that case a less width of wood center would destroy the driving on wood as illustrated on Superior street above Erie street.

This petition is signed by parties in interest represented by the foot front to the amount of 2,376 feet.

The other petition reads as follows: "To the Honorable Board of Improvements, Cleveland, Ohio. Gentlemen—We the undersigned, property owners on Woodland avenue between Madison avenue and Woodland Hills avenue, respectfully ask your honorable body to have the roadway of said avenue paved with eight feet of stone on each side and twenty-four feet of wood between the stone."

This petition is also signed by parties in interest represented by the foot front to the amount of 4,893 feet.

The total amount of feet represented by both petitions is 7,269. Total feet on the street, 8,603.

It is conceded that if both these petitions are to be counted it is petitioned for by more than the requisite number of parties in interest—and if both can not be counted the improvement was not petitioned for by the two-thirds of the parties in interest as required in law to entitle the council to make the assessment, without reference to the limitations of section 543.

The pavement was made by the council eight feet of stone on each side with twenty-four feet center of wood, treated by the Thilmany process; so it will be seen that the work done does not comply literally with either of the petitions.

If three-fourths in interest represented by the feet front of the owners abutting on the street petitioned for the improvement the assessment cannot be enjoined.

\*I am of the opinion that both these petitions are petitions 395 for the improvement within the meaning of the proviso referred to. The statute authorizes the council to act upon a petition for the improvement—not for the particular manner in which

the work is to be done, or the material of which it is composed. Both these petitions ask to have the street paved. That is all the power they have to control the action of the council. If three-fourths do not petition the council could only tax twenty-five per cent. If more than three-fourths petitioned they could tax the whole cost. The council had the right to make the improvement whether any of them petitioned or not. If less than three-fourths petitioned in a case as this is where the value of the lots did not amount to four times the cost of the improvement, the council would not be likely to make the improvement. Therefore every person who signed the petition must be presumed to know that his signature can be used to make up the three-fourths required to secure the pavement, and to that extent his signature gives power to the council to act. Whatever he says beyond that merely expresses his private wish as to the kind of pavement he prefers.

I cannot give the construction to these petitions that in stating how the pavement is to be constructed the petitioners intended to say to the council, "If you will not make the pavement precisely as I want it, I do not want you to do it at all." This would be doing violence to the plain meaning of the language they use. On one petition they say, "We petition for the pavement and you may tax our lots to pay the whole expense, and our wish is that it be twenty-four feet wood center and eight feet on each side;" in the other they say, "We petition for the improvement and you may tax our lots to pay the whole expense, but we wish thirty-two feet wood center treated with Thilmany process and only four feet on each side."

Both classes of petitioners authorize the construction of the pavement and the assessment of the whole cost upon the abutting property.

This construction is decisive of the case.

The petition must therefore be dismissed.

John W. Heisley, for plaintiff; Heisley, Web & Wallace, for defendant.

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### BILLS AND NOTES—EVIDENCE.

[Cuyahoga Common Pleas, November Term, 1879.]

WORTHINGTON, SMITH & CO. v. M. A. SMYTH & H. F. MC-GINNISS.

1. The real contract by which an indorsement in blank was made, may be shown by parol evidence.
2. Where an indorser whose indorsement was made in another state is issued, the laws of that state cannot be judicially noticed, where the question was raised by demurrer, and as a result the laws of this state will be applied.

BARBER, J.

This is an action for money only on a promissory note, which is alleged to be the joint note of the two defendants. The note is in the ordinary form payable to the order of defendant H. F. McGinniss and signed by M. A. Smyth as maker. It reads, "I promise to pay to the order of H. F. McGinniss, etc.," and is indorsed in blank by him. It is dated in New York. There is no averment of notice of non-payment to McGinniss to bind him as an indorser, but in lieu thereof is the following averment: "Said note was made by the defendants and delivered to the plaintiff for goods and merchandise on the day or just previous to its date, sold and delivered by plaintiffs to said Smyth, and in pursuance and performance of an agreement then and there made between plaintiffs and defendants that said McGinniss should as a condition of said sale and delivery of said goods, become a party to said note as surety of said Smyth, and by reason thereof the plaintiffs charge said McGinniss as promissor." To this petition a demurrer is filed by McGinniss on the ground that it does not state facts sufficient to constitute a cause of action against McGinniss. Two reasons are relied upon. First, that parol proof cannot be heard to show that McGinniss occupied any relation to the note other than that of an indorser. Second, that the note was made in New York, and that in that state when even a stranger indorses a note before delivery he is conclusively presumed to be an indorser, and no parol proof can be heard to change that relation, and cases are cited to sustain that doctrine—it being also claimed that the indorser's liability is to be determined by the law of the place where the indorsement is made and not of the form. As to the first proposition, that parol proof cannot be heard to show that McGinniss, although his indorsement was in blank, occupied any other relation than that of an indorser, and would therefore be entitled to notice, it is not now an open question. In the case of *Samuel Dye v. William Scott*, decided by the supreme court, November 18, 1879, volume 4, No. 42, page 914, Cincinnati Law Bulletin, the court hold that "oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing the note in blank, waived demand and notice." This taken in connection with the former decisions on this subject opens the door in all cases between the indorser and his immediate indorsee on a blank indorsement to show by parol the real contract between the parties as to the relation he should assume by his blank indorsement and the presumption that the contract of the law merchant was intended is not conclusive. This removes the first objection of the demurrant. As to the second question that the note was made in New York, and that by the laws of that state no parol proof can be heard, it is not made by this demurrer. To enable the defendant to avail himself of that fact as a defense it must appear not only that the note was made in New York but that the law of New York is different from the law of Ohio. This is a fact to be averred and

proven if denied. It does not appear in the petition, and the court cannot take judicial notice of the laws of New York. The petition contains facts which if true will entitle the plaintiff to recover against the demurring defendant under the laws of Ohio. If the laws of New York afford any defense to him, the note having been made in that state, it is matter of defense which he must aver and prove.

The demurrer must be overruled.

J. H. Webster and J. J. Carran, for plaintiff; Mix, Noble & White, *contra*.

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## \*ASSIGNMENT.

[Cuyahoga District Court, March Term, 1879.]

Watson, Hale and Tibbals, JJ.

E. B. HALE & CO. v. H. J. CALDWELL, ASSIGNEE.

Placing a draft on deposit with a bank will not be considered an equitable assignment of goods the consignment of which is drawn against when the depositor made a mere statement to the payees that it was drawn against a shipment and would be paid.

TIBBALS, J.

This case comes into this court by appeal. The plaintiffs say that on the 5th of June, 1876, they doing a banking business, Ellingwood & Co., brought to them for deposit or collection a certain draft or order upon a firm known as Keath & Swazeott, in St. Louis. They aver that they received that draft, which was for two hundred and fifty dollars, and placed it to their credit under such circumstances with reference to the facts as to amount to an equitable assignment of a certain shipment of lemons against which it was drawn. The paper itself reads, "Cleveland, June 5th, 1876. At sight pay to the order of E. B. Hale & Co. \$250, value received, and charge the same to the account of S. M. Ellingwood"—addressed to Keath & Swazeott.

The averments are that when the draft was presented to them they were informed that it was drawn against a shipment of lemons and would be paid, and that they equitably assigned the lemons to them against which it was drawn. That is the case—not based upon the draft, but upon the facts which resulted in the equitable assignment of that property. Issue was taken upon these averments and the case was heard. The facts are simply these:

The firm of Ellingwood & Co. brought to this firm of bankers this draft, among other matters, for deposit, perhaps some money and some checks, and when the cashier of the bank noticed this draft he called the attention of one of the proprietors to it and stepped back to the clerk and said to him, "What of this? What is there about this?" The language he was almost incapable of

explaining, but it was clearly comprehended. After all the effect was "What is there about this? It is a little out of our line. What are we to understand by it?" He said to him, "It is drawn against a shipment of lemons and will be paid." That is in substance what occurred. Thereupon they entered it to the credit of Ellingwood & Co. and forwarded it to St. Louis and it was not accepted—not heard from. But on the 12th of June, Ellingwood & Co. made an assignment to Mr. Caldwell. In the light of these facts we are called upon to treat that as an assignment of that property. It is true these plaintiffs were imposed upon. They passed over two hundred and fifty dollars to the firm within a few days prior to the assignment of the firm, and they are compelled to come in as ordinary creditors. If we could under any circumstances hold that what occurred operated as a transfer of that property, we should be disposed to do it. But we are compelled to reach the conclusion that the proof will not warrant it. The plaintiffs relied \*simply upon the draft. They took it as such. 402 They inquired simply to get information and they got it. They had confidence in the firm, believed the statement that it would be all right, and relied upon it. They did not follow it up at all by forwarding any shipping bill, or by making any special communications with these parties. The value of the lemons did not exceed one hundred and forty dollars or one hundred and fifty dollars, which was less than the amount of the draft. There is nothing in the case that indicates that they regarded what took place as a transfer of the property to them. On the other hand the reverse. They simply took it, relying upon the honesty of that firm, and they were deceived.

The petition will have to be dismissed.

Ingersoll & Williamson, for plaintiffs; Caldwell & Sherwood, for defendants.

### \*HUSBAND AND WIFE.

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[Lucas Common Pleas, October Term, 1879.]

FRANKLIN HUBBARD V. HANNAH M. HARRIS ET AL.

Where a married woman and her husband, in payment of goods sold to her, convey her land subject to a mortgage, and covenants in the deed to pay the mortgage judgment against her on the covenant may be had, although she and her husband also convey other lands of hers to secure the payment of such incumbrance.

The pleadings show that the plaintiff sold the defendant, Hannah M. Harris, being a married woman and having a separate estate, a certain stock of goods valued at one thousand dollars, and received therefor from the defendant and her husband, a duly executed warranty deed of certain lands in Lucas county, the property of Hannah M. Harris, warranting the same as free and unin-

cumbered save and except as to a certain mortgage of six hundred dollars, which by an especial covenant in the deed the defendant agreed to pay. At the same time said defendant and her husband conveyed to the plaintiff by warranty deed certain lands situated in the state of Michigan. Also the property of Hannah M. Harris, the said parties executing a written agreement that when the defendant had paid off the mortgage of the Lucas county land, if paid within a certain time, the plaintiff was to deed back the property in Michigan, otherwise the deed to remain in full force.

The defendant failed to pay off said incumbrance; the plaintiff to save the property from sale paid same, and now brings this action to recover on the covenant in the first deed.

Trial to Court.

ROUSE, J.

The deed of the Michigan property is a mortgage. Now the facts show that there was a stock of goods sold to Mrs. Harris valued six hundred dollars, and she received them. Now when parties buy goods and receive them, they must pay for them. She is a married woman, but she buys them and takes possession, and turns over a tract of land in payment, but incumbered for six hundred dollars, and she agrees to remove incumbrance.

It is true she has turned over land in Michigan as indemnity to pay off incumbrance; she fails to pay it off. She has the goods and benefits and must pay for them. It makes no difference whether from the Michigan land or other estate.

The superior court, whose decisions have been read (Hamilton v. Laeman et al., 4 Cincinnati Law Bulletin, 911,) is a respectable court, but does not bind us. It is an honest debt and she should honestly pay for it.

Judgment for plaintiff.

Houghton & Tollerton, for plaintiff; Read & Kinney, *contra*.

### \* OCCUPYING CLAIMANT.

[Cuyahoga Common Pleas, November Term, 1879.]

HENRY N. RAYMOND ET AL. V. MATTIE D. ROSS.

The only right a person in possession without title has to recover the value of his improvements is such as the occupying claimant law gives him, and which only gives him a right, in case he is ejected, and he cannot after ejectment maintain an independent action to recover them.

Hearing on demurrer to the petition.

BARBER, J.

The plaintiff seeks to recover the value of improvements made upon premises described in the petition by his grant or while occu-

†Compare Raymond v. Ross, 40 O. S., 343.



pying them under defective title and from which he was subsequently ejected, and also the amount paid by his grantor for the purchase of the premises at tax sale and for taxes since paid by him, together with interest and penalty.

The petition shows that plaintiffs' rights have accrued under a mortgage made by one George A. Landreth on the premises in question which after default was foreclosed and the plaintiffs were the purchasers and are the owners of Landreth's interest in the lands named in the petition. After they thus became the owners of Landreth's rights and before going into actual possession, in 1875, an action in ejectment was commenced in the superior court of Cleveland by one J. H. Newton against said Landreth and the plaintiffs in this action, to recover possession of said lands claiming the same under a superior and better title than that of Landreth. That action resulted in a judgment for possession in favor of Newton, and under it he went into possession. The defendant, Mattie D. Ross, has derived her title from said Newton. No claim was made in that proceeding of any rights under the occupying claimant law.

The rights which plaintiffs are seeking to enforce they aver accrued to them from Landreth by reason of the foreclosure proceedings above stated, and to Landreth under a purchase at tax sale in January, 1859, to one Parley Sheldon, and by an auditor's deed to him two years thereafter, by whom and those claiming under him possession was taken and held up to the ejectment in 1875, and during that occupancy large sums of money were paid for taxes, and lasting and valuable improvements were made by the owner of the tax title on the premises.

The prayer of the petition is as follows: "The plaintiffs therefore pray, that the value of their interest in said premises may be ascertained and the amount paid for said premises at the tax sale thereof and the taxes and assessments since paid on said property and the penalty and interest thereon, and the value of the said improvements as herein set forth may be ascertained by the court and that the defendant may be required within such time as may be fixed by the court to pay plaintiffs the value of said interest in said premises, and on failure so to do, that said premises may be sold and the proceeds thereof applied to the payment of plaintiffs' interest as appears in the said judgment of foreclosure aforesaid, and for such other and further relief in the premises as equity and good conscience may require."

To this petition a general demurrer is interposed. The question to be decided is whether, admitting all the facts set up in the petition to be true, the plaintiffs are entitled to the relief prayed for.

The plaintiffs' claims are based upon the 1st and 2d sections of the occupancy claimant law, S. & C., 881, 2 and 3, and the construction to be given to those sections must determine the rights of the parties.

That without the aid of that statute no right of action exists

was decided by the supreme court in the case of the administrators of Winthrop v. Huntington and wife, 3 O., 327. The syllabus of that case is as follows: "Persons entering land under color of title, paying taxes and making improvements as owner, being ejected at law, cannot sustain a bill in equity for compensation and reimbursement against the rightful owner."

Again in the case of Lieby v. The Heirs of Ludlow and C. Park, 4 O., 469, on page 494, the court say: "The right of a defendant in ejectment to recover payment for improvements he has made on the premises recovered of him is given by the occupying claimant laws; the rules and mode by which the amount shall be ascertained are prescribed by these laws and the proceedings are all required to be in the court of law in which the ejectment is tried. The law does not give this court jurisdiction in such cases. [The application in that case was to enjoin the proceedings in ejectment.] The remedy at law is as plain and as adequate as the legislature choose to make it."

These decisions are only an authoritative statement of the principle which has always prevailed at common law that a person who makes improvements on the property of another either as a volunteer or under an adverse claim of title does so at his peril and cannot call upon the owner to reimburse him—and they clearly settle the question that any rights which Landreth had to reimbursement are to be found in the provisions of the occupying claimant law, as the statute now in force is not materially different in these respects from the occupying claimant law under which those decisions were rendered. S. & C., 881, and Chase, vol. 1, page 671.

The first section of the occupying claimant law, so far as is necessary for the question before us, reads as follows: S. & C., 881, section 1. "Be it enacted, etc. That in all cases where any occupying claimant being in quiet possession of any lands or tenements \* \* \* or being in possession of and holding any land under any sale for taxes authorized by the laws of this state \* \*

\* shall not be evicted or turned out of possession by any person or persons who shall set up and prove an adverse and better title to said lands until said occupying claimant, his, her, or their heirs, shall be fully paid the value of all lasting and valuable improvements made on said land by such occupying claimant or by the person under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim, \* \* \* unless such occupying claimant shall refuse to pay \* \* \* the value of the land without the improvements made thereon as aforesaid upon the demand of the successful claimant. \* \* \*

"Sec. 2. That the title by which such successful claimant succeeds against the occupying claimant in all cases of lands sold for taxes \* \* \* shall be considered an adverse and better title, under the provisions of the first section, whether it be the title  
411 \*under which the taxes were due and for which said land was sold or any other title or claim whatever; and the occupying

claimant holding possession of lands sold for taxes as aforesaid \* \* \* shall be considered as having sufficient title to said land to demand the value of improvements under the provisions of the first section of this act."

The fourth section provides that the court rendering judgment against the occupying claimant shall at the request of either party empanel a jury to assess the value of the improvements, or if the successful claimant elect to take the value of the land, to assess the value of the land without the improvements, etc.

No right of action is given by statute to the occupying claimant against the successful claimant. Indeed, I do not well see how a right of action could be given without violating the provisions of the constitution, section 19, art. 1. The statute merely makes a condition that the successful claimant in an action at law shall do equity towards the occupying claimant before it will entitle him to use the process of the courts to put him in possession of the property to which the improvements are attached which have been innocently placed there and the value of which he will obtain—a principle which courts of equity have always enforced when a party comes into such a court for relief.

Landreth and these plaintiffs have, as appears by the petition, had their day in court. They have failed to set up their claim to improvements and have suffered themselves to be ejected; they are therefore remediless. But it is claimed these plaintiffs stand on different ground from Landreth. That their cross-petition was dismissed in the superior court ejectment case, and that Landreth had no interest to set up his occupying claimant rights; indeed, that he had none, as they had been conveyed to these plaintiffs. Nothing of this is set up in the petition, but if that be so it does not affect this action. If error was committed in that case they must pursue their remedy in that case. Dismissal without prejudice would not give them a right of action they did not already have. In their action in foreclosure and by purchasing the property at the foreclosure sale they simply obtained the rights of Landreth. They were made a party with Landreth, had full notice of the action and are bound by the judgment.

It is claimed that whatever may be the effect of that judgment upon the occupying claimant, these plaintiffs having procured whatever title he had, the title given to him or defined in the last clause of section 2 of the occupying claimant law, their rights are not concluded by that judgment. What might have been the effect if they had not been made parties to the ejectment suit we are not now called upon to decide. The rights of the plaintiffs were derived from Landreth and whatever relief they were entitled to were involved in that action, and if they failed to set them up or to press them to a final judgment in their favor in that court, they cannot now be permitted to maintain them in another action.

It is possible that the right to reimbursement for the payments on account of taxes may stand upon a different footing—and if

saved to them by dismissal of their cross-petition in the superior court—if proper averments were made in the petition, but nothing of this kind appears in the petition, although claimed in argument. It is not therefore in the case. Demurrer sustained.

### LICENSE.

[Cuyahoga Common Pleas, November Term, 1879.]

† FREDERICK WILSON V. EDWIN HIGGINS.

To sustain a parol license to maintain a ditch across the land of another, it is not sufficient to aver merely that the occupancy of the lessee was originally under a parol license for a valuable consideration, and has been for nineteen years open, visible, adverse and notorious. It must appear that it would be inequitable to close the ditch up.

BARBER, J.

This action is one for trespass on real estate. The facts set up in the petition are that he is the owner of a lot of land extending to the center of the road along which it lies, and the defendant occupies land on the opposite side also extending to the center of the road. That the defendant, on the 11th day of January, 1875, entered upon plaintiff's premises and dug and opened an artificial drain across the highway to and upon the plaintiff's premises, causing a flow of water thereon, rolled stones through his hedges, and did other injuries to plaintiff's land.

The second defense is in substance that a former owner of the land occupied by him, for a valuable consideration, obtained from a former owner of the land occupied by the plaintiff a parol license to dig a ditch or drain from his cellar, across the highway and to terminate on the land now owned and occupied by the plaintiff. That he and his predecessor have occupied this land and used and kept open this drain for the period of nineteen years, and that possession has been open, notorious and adverse—and that he has not at any time within the time named in the petition entered upon the plaintiff's premises except to open and maintain and remove obstructions from the opening of said drain, and in doing so has done no injury to plaintiff's premises beyond what he lawfully might do.

To this answer this demurrer is interposed on the ground that it contains no defense to plaintiff's claim.

The question raised by this demurrer involves a construction of the rights acquired under a parol license for the occupancy of real estate and to whom they extend.

In *Wilkins v. Irvine*, 33 O. St., 13, the supreme court commission decide that an interest in, or permanent incumbrance upon land in this state can only arise from some of the modes provided for or recognized in law. They hold that a written license for a valuable consideration is only a license to enter upon the land for a specific purpose. It has none of the characteristics provided by statute creating an incumbrance that could possibly impart to the instrument a quality to run with the land.

† Another decision in this case is found 2 Clev., 73 (381 this Vol.)

Such licenses amount to no more than an excuse for the act which would otherwise be a trespass. A permanent right, say the commission, to enter upon another's land for a particular purpose without his consent is an important interest which should pass only in the mode and by the instrumentalities provided by law.

The right then which the defendant claims to enter upon the plaintiff's land is not a right which runs with the land. It is a mere license. Our supreme court has held that an executed license for a valuable consideration is irrevocable in cases between the parties to the license.

Wilson et al. v. Chalfant, 15 O., 248.

Hornbach v. The Cin. & L. R. R. 20 O. St., 81.

If the license does not run with the land subsequent purchasers can only be bound by it when in the execution of the license the licensee has such possession as would take it out of the statute of frauds and give him an interest in the real estate which would run with the land and might be enforced in equity. Such an executed license for a consideration might bind subsequent purchasers with notice. But unless the execution of the license is also accompanied by an actual and continued change of possession, while it cannot be revoked by the licensor, \*does not run with the land 412 and does not bind subsequent purchasers. The right of the licensee then to use the land of the licensor for the purposes intended by the license depends wholly upon his possession, and such possession as shall be notice to the purchaser. In that case or in case of actual notice given by the licensee to the purchaser ought the license in all cases to be upheld? In other words should the possession and right of the licensee be made perpetual from the sole fact of possession or notice given to the purchaser? If so it would be in the power of the licensee by continued possession or notice to purchasers to perpetuate his license, making it the equivalent of an interest in the land or an incumbrance. The supreme court do not appear to have decided that question in either of the cases cited. In the case of Wilson et al v. Chalfant the court says: In the case at bar the license was executed and the consideration paid and the defendant in error had the right to make the abutment, it follows as an incident to that right that he acquired the lawful possession of the *loans in quo* for that purpose and the right of ingress and egress to keep it in repair and control it so long as it remains for the purpose for which it was constructed. If this license be for the purpose of an abutment for a mill dam or a race to conduct water to a mill, or the right of way of a railroad, the very nature of the occupation shows that the license contemplated the use of the other land for that purpose as long as the mill or the railroad should be continued. It would be the sale of the possession of that land for that purpose and therefore while the possession continued it would be taken out of the statute of frauds by that possession, but when the railroad or mill should cease and the occupation for that purpose should cease the license terminates.

But to bring the licensee within that rule the possession must be such and the purposes of the license such that the purchaser would be notified by it that the occupancy of the land was intended to be continued and that it would operate as a fraud upon the rights of the licensee not to continue it—otherwise the license is merely personal. If it is unexecuted it may be revoked at the will of the licensor. The death of the licensor or licensee or the sale of the premises operates as a revocation. Angell on Water Courses (5th edition), sections 286 and 287, authorities there cited.

The only question in this case then is, has the defendant in his answer brought his defense within this rule? He says that his occupancy and his predecessor's in ownership of the premises he occupies and which are drained by the ditch in question has continued for the period of nineteen years. That the ditch in question was originally constructed by his predecessor in ownership upon the express consent and license of the then owner of the premises now owned and occupied by the plaintiff and for a valuable consideration that his possession of the small amount of land belonging to plaintiff crossed by said ditch, and the possession and use of his predecessor's for the purpose of maintaining said cellar drain for said nineteen years has been and is open, visible, adverse and notorious and was in fact well known to the plaintiff long before he became the owner of the premises in question. This is substantially all that is said as to the possession and occupancy of the plaintiff's land for the purposes of the ditch. There is no averment of any possession of the plaintiff's land in any other way than that the ditch extended and ended on the plaintiff's land, and that defendant and his predecessors had used and possessed the ditch to drain their cellar. This amounts only to an averment that the ditch was originally built under a parol license for a valuable consideration. The parol license was executed when the ditch was built. To make this a license to maintain the ditch as long as that cellar existed and the owner of it wanted to drain it through that ditch, and for that purpose to enter upon the land of the licensor after his seizen has terminated, something more is necessary. It does not appear that it would be inequitable that the ditch be closed up in plaintiff's land and the right to come there to repair and keep it open and in repair.

It does not appear, why, if any reason exists, he does not end the drain on his own side of the road, or that it cannot as easily be carried away on his side of the road. He does say it is the natural and proper course of the flow of water from defendant's land—but that gives him no right to maintain an artificial water course and burden the plaintiff with the drainage from defendant's cellar. The action in this case is for trespass—such state of facts might exist as to be an excuse for the trespass—as by long continued use and maintenance of the ditch by the consent or sufferance of the plaintiff, but no such facts are pleaded.

The demurrer must be sustained.

Prentice & Ford, for plaintiff; Tyler & Denison, for defendant.

# INDEX.

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## ACCORD AND SATISFACTION—

In an accord and satisfaction there must be a mutuality of understanding between the parties. The amount must not only be paid by the debtor, but it must have been received by the creditor as an accord and a satisfaction. *Ins. Co. v. Ins. Co.*, 1 Rep., 81. 158

## ACCOUNTS—

A petition on an account giving a copy of the account but not averring what is due or what plaintiff claims, is not a compliance with section 122 of the code, (§5086 Rev. Stat.), and is demurrable. *Beck v. Ball*, 1 Rep., 147. 233

## ADMINISTRATORS AND EXECUTORS—

The act of appointing a debtor as an executor, does not extinguish his liability on the debt. *Collins v. Nugent*, 1 Rep., 190. 289

A legatee cannot bring an action on an executor's bond for the benefit of the estate in his own name. *Dawson v. Mighton*, 1 Rep., 115. 204

## AGENCY—

An agent exceeding his authority cannot bind his principal, when the person dealing with the agent knows he is exceeding the powers delegated to him. *Curtiss v. Hutchinson*, Rec., 19. 19

Where plaintiff, being the owner of goods, furnishes a person with samples and price lists, who is sent out to sell, and is afterwards furnished with goods to fill his orders obtained from defendant. *Held*, that the defendant may assume that the agent was authorized to collect, and such defendant is not liable if the agent absconds with the money so collected. *Beckwith v. Reed*, 2 Rep., 162. 436

Where a written contract by an agent for his principal expressly states that the agent has no authority to make any different contract than that signed, no representation of the agent as to further rights are admissible to alter it. *Leslie v. Evans*, 1 Rep., 273. 307

Parol testimony may be introduced to show whether an order, not negotiable, was signed by the drawer as principal or as agent. *Gilbert v. Church*, 1 Rep., 275. 312

Where an agent is sent out to paint sign on building, conditioned that he first get the proper authority; *Held*, that such agency is special, and therefore the principal is not liable to any owner if the agent only got leave from the tenant to paint such signs upon the buildings of the landlord. *Kilfoyl v. Hall*, 2 Rep., 370. 552

A statement of an agent of the company that a policy which is for a certain number of years, is a policy from year to year, and can be terminated by the refusal to pay installments on the premium note, is a mere opinion and no defense to an action on the note. *Ins. Co. v. Sorter*, 1 Rep., 133. 226

## AMENDMENTS—

The court will be liberal in allowing amendments, to promote substantial justice. *Slade v. Doolittle*, Rec., 54. 42

## APPEALS—

Immediately on appeal from the common pleas to the district court, the penalty allowed by the law attaches, and it cannot be avoided by tendering the amount of the debt and costs before judgment in the district court. *Leffigwell v. Castle*, Rec., 36. 31

In cases where there is an absence of defense and an appeal for delay, the penalty will be only five per cent. unless it appears that the appeal was also for the purpose of vexing and harassing the plaintiff. *Ib.* 16.

A memorandum of the judge on his calendar of notice of appeal, in which the amount of the bond was never fixed, is not a notice of appeal on the records and hence must be dismissed. *Humphrey v. Berchtold* 1 Rep., 89. 169

A petition by an administrator to sell land of the decedent to pay debts, and to sell land fraudulently conveyed by him, is not an action or a suit, but a statutory proceeding and is therefore not appealable to the district court. *Webster v. Ballard*, 2 Rep., 137. 419

A guardian has no authority to appeal a case from a justice court to the common pleas, without giving the bond required in the justice act. *Balten v. Rolo*, 1 Rep., 9. 80

Where a judgment is rendered by a justice against a defendant not present, and an appeal bond is given by the defendant's attorney without authority, which is immediately repudiated by the defendant, who, instead, seeks to move to vacate the judgment, the justice does not err in regarding the appeal as a nullity and in entertaining the motion. *Stoue Co. v. French*, 1 Rep., 69. 141

An action of replevin is appealable, where the case is tried to a jury and judgment is rendered in favor of plaintiff for only twelve dollars. *White v. Coates*, 1 Rep., 43. 119

## ARBITRATION—

The submission of a claim by an executor against the decedent's real estate is unauthorized, and the award constitutes no cause of action. *Hart v. Corlett*. 1 Rep., 92. 181

## ASSAULT AND BATTERY—

Where a person is on trial under an indictment for assault and battery, a verdict of guilty of assault is good, though it does not respond to the allegations of a battery. *Harrington v. State*, 2 Rep., 113. 402

## ASSESSMENTS—

The city of Toledo passed ordinances for the improvement of part of Summit street, and assessed the expense at a fixed sum per foot front on the land abutting on the improvement, and authorized plaintiff to collect the assessments in his own name, he having done the work in making the improvement. *Held*: The plaintiff had a right in his own name to collect the assessments; and that this court has jurisdiction of this case, the plaintiff not being a citizen of Ohio and taking by operation of law, and not by assignment under the 11th section of the U. S. judiciary act of 1789. *Stimson v. Scott*, Rec., 45. 37

The plaintiff has a right in his own name to collect the assessments; and this court has jurisdiction of this case, the plaintiff not being a citizen of Ohio and taking by operation of law, and not by assignment under the 11th section of the U. S. Judiciary Act of 1789. *Ib.*

Such assessments are not unconstitutional under the new constitution of Ohio. *Ib.*

Action to recover back the amount of an assessment paid. *Kelley v. Everett*, Rep., 76. 152



The city council, in making the assessment under the limitation contained in section 543 of the Municipal Code, to pay the expense of the improvement, is not required to wait until the improvement is done before making the assessment. *Morgan v. Cleveland*, 1 Rep., 38. 113

The limitation contained in this section relates merely to the extent of the charge; and no time is attempted to be fixed when the charge may be imposed; but the statute authorizes an assessment, and its collection, before the improvement is actually made. *Id.*

In a levy for an assessment according to benefits for improving a street, it being claimed that the estimating and equalizing boards never made any appraisement of benefits, but proceeded arbitrarily to assess the lots, the presumption, in the absence of anything in the record of the proceedings to the contrary, that these boards did their duty, does not obtain as to matters which they were not required to do. And where the records do not disclose that the essential things were done cannot be shown by parol. *Hill v. Cleveland*, 2 Rep., 385. 562

Where a village, while making a street improvement, is annexed to a city which completes the proceedings, the city can assess the annexed proprietors to the same amount that it could other citizens, and is not limited to the amount that the village could assess. *Andrews v. Pelton*, 1 Rep., 84. 168

Where the mode and method of levying assessments, to pay the cost and expense of grading, draining, paving and improving a street, is prescribed by statute, an ordinance which seeks to prescribe the method of such assessment and which does not conform to the provisions of such statute will be held to be illegal and void. *Allen v. Cleveland*, 1 Rep., 2. 77

When the board of improvements of a city seek to go outside of the line of improvement to pay for the same, it must first determine that a certain line of property should bear its proportion of the cost of the improvement, and each board is to exercise a judicial discretion. *Id.*

The mere fact of petitioning for a street improvement does not estop one to claim that the assessment exceeds twenty five per cent. and that an annual installment exceeds ten per cent. of the value of the land. *Hammond v. Pelton*, 1 Rep., 59. 132

A life tenant of an estate having paid an assessment for the improvement of the property, may recover from the remainder man an amount in proportion according to the relative value of the improvement to the respective estates. *Crawford v. Crawford*, 1 Rep., 67. 138

An assessment made and levied on the tracks and franchises of a street railway creates a lien on the same from the date of levying the assessment. *Cleveland v. Ry. Co.*, 1 Rep., 304. 315

When an assessment is to be levied upon property not abutting upon the improvement, such assessment may be levied in the manner prescribed in sections 548-589, inclusive, "upon lots and lands benefited thereby, including lots and lands that are contiguous and adjacent as well as those that abut" upon the street, according to the benefits thereto from the improvement. *Otis v. Cleveland*, 1 Rep., 91. 176

When an installment of an assessment is found to exceed ten per cent. of the land, the excess may be adjudged against the following years. *Hammond v. Pelton*, 1 Rep., 59. 132

The improvement of a street must be considered as petitioned for by three-fourths of the abutting owners, so as to allow an assessment of more than one-quarter of the value of the property, although the petition therefor asks for an improvement by a pavement different from that adopted, as the council is not restricted to the kind of material asked for in the improvement. *Namelink v. Cleveland*, 2 Rep., 394. 572

#### ASSIGNMENT FOR CREDITORS—

An assignment made by G, a citizen of Virginia, of personal property situated in Ohio, to assignees, for the benefit of G's creditors, the assignees also being citizens of Virginia, is a contract made in and to be governed by the laws of Virginia. *Wickham v. Dillon*, Rec., 79. 60

## ASSIGNMENT FOR CREDITORS—Concluded—

When such assignment stipulates—1st, for the payment of the expenses of the execution of the trust—2d, for the distribution of the proceeds to such creditors as within six months shall come in and assent to the terms of the assignment, by subscribing a release of the assignor—3d, for excluding from benefit under the assignment any creditor who may issue legal process either against the goods or body of the assignor—4th, that the residue shall be distributed among such creditors as shall not within six months release the assignor from all liability—5th, that the surplus, if any, be paid to the assignor—it is valid by the laws of Virginia, and will be sustained in this state, when the transaction is not fraudulent in fact. *Ib.*

An assignment, by a debtor, to a trustee, for the benefit of creditors, will prevail over a prior mortgage, executed by the assignor on his stock of goods, with the understanding by *the mortgagee* and mortgagor, that the mortgagor might continue thereafter to deal with the property as his own, provided the understanding is strictly proved. *Canfield v. Lathrop, Rec., 87.* 51

An assignment by an independent bank, incorporated under the general banking law of Ohio, providing for the payment, 1st, of the circulating notes of the bank, 2d, for the payment of the other indebtedness rateably, 3d, for payment of the surplus, if any, to the stockholders, is not void, although made in the view of *general* insolvency, provided it is not made in contemplation of suspending specie payments on its circulating notes. *Armstrong v. Grannis, Rec., 71.* 54

If such assignment is made for the purpose of preventing the assets of the bank from going into the hands of a receiver, to be appointed by the state officers, in case it should suspend specie payments, and to keep them under the control of persons of its own selection, the assignment is a fraud on the law under which the bank is chartered, and is void. *Ib.*

If the object in view in making the assignment be lawful, although made with the intent to delay creditors so far as may be necessary to secure the object in view, the assignment is valid. *Ib.*

A transfer by the assignees to the receiver appointed by the state officers, after *the act* of insolvency contemplated by the statute is committed, of all the assets coming to them by the assignment, vests in the receiver all interest and rights which the assignees took by the assignment. *Ib.*

If, in an action against the assignee to establish his claim, the creditor joins the assignors and gets judgment against them also, the trust should not be charged with the cost of so doing, and the court may charge the costs upon the creditor, and if afterwards the assignee refuses to pay the dividend, and suit is brought on his bond and the sureties pay the claim, they must also pay the costs of this latter suit. *Holkins v. Donahue, 2 Rep., 114.* 405

Where a creditor drew a draft for the whole amount of the indebtedness due him by the drawee, and assigned the draft to plaintiff, and the drawee afterwards in ignorance of a draft having been drawn on him, forwards a check to the creditor, who collects and deposits it to his own credit, and afterwards makes an assignment for benefit of creditors, such unaccepted draft is an equitable assignment of the fund, and plaintiff is entitled to the deposit in the bank, being the proceeds of the fund. *Bank v. Gardner, 1 Rep., 139.* 229

The false representations of A to B in order to obtain his accommodation indorsement to a note that C whose name was forged, had signed, and that A had transferred certain account to C as security for the note, estops A and consequently his assignee for creditors to deny the assignment to C and the assignee must hold them in trust for the payment of such note. *Raymond v. Foster, 1 Rep., 149.* 240

Placing a draft on deposit with a bank will not be considered an equitable assignment of goods the consignment of which is drawn against when the depositor made a mere statement to the payees that it was drawn against a shipment and would be paid. *Hale v. Caldwell, 2 Rep., 401.* 576

A contract with a firm to put machinery in a factory in another town belonging to another and distinct firm, but having a partner common to both, cannot be the foundation of a preferred claim on the property of the former firm, in the hands of an assignee, nor can the assignee who paid it as a preferred claim, in ignorance of the facts, be estopped to claim repayment. *Lord v. Chaffee*, 2 Rep., 297. 514

**ATTACHMENT—**

In case of foreign attachment under the code, it is not necessary to issue a summons, where it cannot be personally served. *Pratt v. Sherman et al.* Rec., 14. 16

To authorize a judgment, there must be either personal service by summons, or proof of notice of publication, before the rendition of judgment. 16.

Demurrer will be sustained in a suit to recover for the wrongful attachment of goods, where the action is not on the bond, and no malice or want of probable cause is averred. *Withan v. Hubbell*, 1 Rep., 1. 75

Where the defense in an attachment proceeding is, that the amount due had been garnisheed in another action there being no denial as to the merits of the claim, is an abatement only, and to be complete should aver a readiness to pay what was demanded or to submit it to the disposition of the court. *Scott v. Hudson*, 2 Rep., 97. 392

A man not living with his wife and children and not contributing to their support, but has another woman whom he claims to be his wife living in another state, who has children by another man, cannot hold his wages exempt from attachment as being necessary for the support of his family. *Wright v. Ball*, 1 Rep., 141. 231

Where an attachment is issued and plaintiff seeks to garnishee funds in his own possession, the objection cannot be made by a motion to discharge the attachment process. *Mining Co. v. Water Co.*, 1 Rep., 117. 208  
If a person garnishees funds in his own hands and gets nothing, a motion to discharge does not lie. 16.

**ATTORNEY—**

It is misconduct in office, such as warrants the suspension of an attorney from practice, to compound a misdemeanor. *State v. Eager*, 2 Rep., 1. 351

An attorney may be disbarred for misconduct, not necessarily misconduct as an attorney, otherwise the court could not disbar for crime, but there must be misconduct, and hence bad motive must be charged, and if the information is consistent with proper motives it is demurrable. *State v. Bentley*, 2 Rep., 27. 362

An attorney, as between himself and his client, has a lien on the judgment for reasonable fees agreed upon to be paid, and an assignment by such judgment creditor of the judgment to pay a debt due from his wife does not defeat the attorney's lien. *Hinman v. Rogers*, 1 Rep., 267. 303

In an action to reach property alleged to be sold in fraud of creditors, the attorney of the first grantee with his consent, may testify to facts obtained in his capacity as attorney, without the consent of the other parties to the transaction. *Stoppel v. Woolner*, 2 Rep., 252. 489

**BASTARDY—**

A recognizance in bastardy, conditioned that the putative father shall appear before the common pleas court at the first day of the term thereof, omitting the word "next" before the word "term" will be construed in connection with the statute requiring him to appear at the next term, and will be sustained as a bond which is broken by nonappearance at said term. *Jedlicka v. State*, 2 Rep., 196. 463

A plea in bar (a defense of former proceedings in a bastardy case and a settlement), cannot be tried on a motion to dismiss, for it must be submitted to a jury. *Fowler v. Zimmermann*, 1 Rep., 195. 271

## BILLS, NOTES AND CHECKS—

An endorsement on a note in these words: "Notice of presentment, demand and protest waived," is not only a waiver of a demand of payment, but of notice of non-payment to the indorser, at the maturity of the note. *Seymour v. Francisco*, Rec., 9. 12

A certificate of deposit for \$1,150, to draw interest if left thirty days, and payable on return of the certificate properly indorsed, is a good promissory note. *Furnace Co. v. Lewis*, Rec., 15. 17

The charter of plaintiff, requiring the funds of the company to be used in the manufacture of iron, etc., it could not legally become possessed of such certificate, unless in the course of its legitimate business. 16.

If the plaintiff became possessed of such certificate as indorsee, under circumstances sufficient to put it on inquiry as to its character in the hands of the original holder, then the same defense might be made to it as if in the hands of such original holder. 16.

Such, also, would be the case if the assignor had indemnified the plaintiff. If demand of payment of the certificate had been made before it was received by plaintiff, it must be treated as an overdue note, and be subject to such defenses as it would be in the hands of the original holder. 16.

A note in which the payee's name is blank, is payable to bearer. *Simmons v. Brown*, Rec., 33. 29

A power of attorney to confess judgment on such note in favor of the holder thereof, is available to the person who may be the holder of the note at the time judgment is rendered, although not the original holder, or payee. 16.

A promissory note drawn by R, payable generally to W's order, and by W. endorsed for R's accommodation, no blank being left for inserting a place of payment, may be avoided by W, if R before he parts with the note inserts in it a place of payment with the knowledge or consent of W. *Sturges v. Williams*, Rec., 39. 33

In a suit on a protested foreign bill of exchange, for damages as well as principal, the bill being addressed to D. & Co., Phila., Pa., it will be presumed that the drawees resided there, and the court will take judicial notice that such place is out of the state of Ohio. *Thomas v. Bank*, Rec. 37. 32

Where C is sued as maker of a note signed C. & Co., and payable to W. & Co., C may set up and prove in defense that he was not a member of the firm, but merely an employee, which fact was known to all parties, and under these circumstances, C cannot be held liable on the note. *Chambers v. Bank*, 2 Rep., 235. 486

October 20, 1875, D. H. B. wrote to C. A. B.: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft." C. A. B. was then in embarrassed circumstances. November 15, 1875, C. A. B. indorsed to S. W. & Co. two drafts on D. H. B., dated November 12 and 15 respectively, to take up notes previously given by C. A. B. to S. W. & Co. *Held*: That D. H. B. is not liable in an action by S. W. & Co. for the amount of the drafts, S. W. & Co., at the time the drafts were transferred to them, having knowledge of the insolvency of C. A. B. *Sherwin v. Brigham*, 2 Rep., 228. 482

If a draft which D. H. B. authorizes C. A. B. to draw on him for the latter's accommodation for discount at a particular bank, is drawn and endorsed directly to S. W. & Co., after refusal by the bank to discount, it is a misappropriation of the same, and D. H. B. is not liable. *Sherwin v. Brigham*, 1 Rep., 18. 94

If C. A. B., after such authority becomes insolvent before drawing such draft, but does draw after his insolvency, and endorses the same to S. W. & Co. who knew of the insolvency, in such case the promise of D. H. B. to accept is not binding. 16.

- An answer in an action on a bill of exchange not indorsed by the payee, denying that plaintiff is the owner of it, and averring that he did not receive it in due course of trade, is a good answer. *Banking Co. v. McDonald*, 1 Rep., 173. 255
- A petition on notes alleging that a copy of which are attached to the petition, but not stating that all the credits are thereon given, is not demurrable. *Ingersol v. Craw*, 1 Rep., 1. 76
- Although a maker is insolvent and the indorsee indorses the note after it is due, demand and notice are necessary to fix the indorser's liability. *Hudson v. Walcott*, 2 Rep., 194. 459
- Where an indorsement was made at or before the execution of a note, or pursuant to an agreement to become responsible from such time, such indorser is presumably a co-maker, and can be sued as such, with the privileges of a surety, and parol evidence is admissible to show the nature of his liability. *Wright v. Denham*, 2 Rep., 146. 428
- In an action on a note and to foreclose a mortgage, showing that plaintiff became owner long before maturity, an answer setting up fraud and want of consideration without averring knowledge on the part of plaintiff thereof is demurrable. *Wisenogle v. Powers*, 1 Rep., 141. 232
- An answer by an indorser not in the claim of title being sued as maker, that he signed it as an indorser, is defective, for it avers no agreement with any one, and the law would then presume, in the absence of any such agreement, that the note was signed by him as guarantor. *Bartlett v. Jones*, 1 Rep., 219. 292
- Where an answer sets up a partial defense, as of payment or of usury, though it does not meet the whole case, a general demurrer will not lie, else if overruled judgment would go for the whole. 16.
- A petition on a promissory note against the maker and indorser, which contains no averment of protest, or that the indorser had notice of protest or of payment, is demurrable by the indorser. *Tousley v. Schwind*, 1 Rep., 148. 235
- In an action by plaintiff for judgment on a note and for foreclosure of a mortgage, and plaintiff avers that the note was made to an administrator and assigned to plaintiff, the note and mortgage are open to all defenses, and an answer setting up usury is valid, for plaintiff does not hold by indorsement nor in due course of trade, he being only an equitable holder of the note. *Heninger v. Wager*, 1 Rep., 156. 242
- An answer of the last indorser stating that he indorsed for the accommodation of the plaintiff and a prior indorser, to enable them to take up a prior note, and that the prior indorser received whatever consideration was paid by plaintiff for the note, is a good answer. *Simms v. Field*, 1 Rep., 337. 334
- Action on a promissory note in which the defense of usury is set up, and a new trial sought on the ground that the court erred in overruling certain requests of counsel to charge the jury. *Hayden v. Miller*, 1 Rep., 114. 201
- A note given by the trustees of a church to pay for insurance premiums on the church and signed by them with their own names "as trustees," the association not being named, binds the trustees personally. *Ins. Co. v. Sorter*, 1 Rep., 133. 228
- Where a premium note provides that the charter of the company is part of the contract, and the charter provides that the company should not be liable while an installment of the premium note is overdue, is no defense to an action on the note, and the liability of the maker of the note remains the same. 16.

BONDS—

- Correction of replevin bond. *Taylor v. Graves*, 1 Rep., 31 107
- Where a justice improperly refused to allow a party to execute an appeal bond, the court can not after the time in which it can be done has passed, compel the justice by mandamus, to allow it. *State v. Block*, 1 Rep., 285. 314

**BONDS—Concluded—**

A bond made without naming any obligee, is void, and in an action to recover the penalty without seeking reformation, no recovery can be had, either against the principal or surety. *State v. Watson*, 2 Rep., 314. 526

**BILLS OF REVIEW—**

The courts, in bills of review, are governed by rules similar to applications for a new trial, where there has been a verdict by jury. *Curtiss v. Hutchinson*, Rec., 19. 19

**BREACH OF PROMISE—**

A petition alleging a breach of a promise of marriage, and a promise as a condition precedent of the marriage in which defendant promised plaintiff that he would give her a sum of money and a secured note and marry her within a reasonable time constitutes a single cause of action, namely, breach of the marriage contract, and a motion to separately state and number the causes of action must be overruled. *Dalton v. Barchard*, 2 Rep., 57. 375

**BUILDING ASSOCIATIONS—**

A building and loan association which is forbidden by its charter to loan to any but members or depositors, made a loan to one who deposited \$25 before delivery of his mortgage, and drew it out the day after, is not unauthorized, and such mortgage is valid. *Lockwood v. Robbins*, 1 Rep., 101. 192

**CHAMPERTY—**

The defendant sought to show by the cross-examination of the plaintiff (the action having been brought to rescind a contract for the sale of certain mining stock by the plaintiff to defendant upon the ground of fraud), that since the commencement of the action the plaintiff had entered into certain champertous contracts under which the parties with whom the plaintiff made the same were to furnish means for the continued prosecution of the plaintiff's action, and to share in the proceeds of any recovery that might be had therein by the plaintiff. *Held: Ford v. Holden*, 2 Rep., 33. 364

That it was not a proper subject of cross-examination. *Ib.*

That the making of such champertous contracts by the plaintiff did not constitute any defense on behalf of the defendant to the plaintiff's claim, and therefore furnished no ground for a dismissal of the action. *Ib.*

An agreement between an attorney and his client to pay the attorney's fees out of the amount collected, but not such as to prevent the parties themselves settling, is not champertous. *Hinman v. Rogers*, 1 Rep., 267. 303

**CHARGE TO JURY—**

A passage in a charge to the jury, that if a man of ordinary prudence, knowing what the deceased did, and seeing what he saw, situate as he was, would have done as he did, he was not guilty of contributory negligence, and such charge is not erroneous. *Railroad v. Wernsing*, 1 Rep., 212. 287

Where exceptions are taken to a general charge given by a court to the jury, unless the party excepting points out specifically the part of the charge excepted to, or the grounds of his exceptions, a reviewing court is not bound to take notice of such exception. *Wright v. Denham*, 2 Rep., 146. 428

**CHATTEL MORTGAGE—**

If C knew of the mortgage when he became the assignee of the property he was not a purchaser in good faith, and it was not necessary to the validity of the mortgage that it should be deposited in any clerk's or recorder's office. *Canfield v. Lathrop*, Rec., 67. 51

A chattel mortgage, if the mortgagor resided in the township of Brooklyn when it was executed, must be deposited in the clerk's office of Brooklyn township, although that part of Brooklyn township in which the mortgagor resided was also in the city of Cleveland. *Ib.*

Where the affidavit on an indemnity chattel mortgage does not state the amount, and the face of the mortgage does not show the amounts, and subsequent affidavit says "there is still due \$25,000 as within set forth" it is not in compliance with the statute. *Winslow v. Wilkins*, 2 Rep., 387.  
567

Where a chattel mortgage has been set aside as fraudulent and an assignee appointed, the refusal of the assignee to set apart part of the property in lieu of a homestead is a breach of his official bond. *Hall v. Brown*, 1 Rep., 9.  
80

A mortgage on the goods, fixtures and accounts of a business, without any change of possession, is void as against the mortgagor's assignee for benefit of creditors as to the stock of goods, but good as to the store fixtures and the amount realized from the accounts. *Hart v. Heard*, 1 Rep., 67.  
140

Where S makes an accommodation chattel mortgage to L, and L to secure him makes to him a chattel mortgage with the affidavit in the ordinary form it was held that this is proper if L was to pay, or had paid the former mortgage, but was bad if L was merely to raise money on the former for himself and was to pay it, for in such case S is a mere surety. *Sothern v. Wilcox*, 1 Rep., 171.  
251

The re-filing of an original chattel mortgage, with all proper indorsements, is a substantial compliance with the statute. *Rehak v. Wilcox*, 2 Rep., 65.,  
379

Although the mortgagee of chattels neglects and fails to re-file his mortgage (or copy) within a year from and after the first filing, yet if he does so re-file it after the year, he will, in the absence of fraud, be protected and his mortgage will be valid, as against an execution creditor, whose execution is not levied until *after* the second filing. *Ib.*

#### COMMON CARRIER—

An action against a carrier for not safely delivering cattle within a reasonable time, but continuing in possession wrongfully and putting them in a pen with diseased cattle, where they died, is on a single cause of action, and a motion to separately state and number will be overruled. *Baldwin v. Railroad*, 1 Rep., 178.  
281

#### CONSTITUTIONAL LAW—

The act of May 4th, 1869, requiring railroads to use certain kinds of heating apparatus so constructed that it will extinguish the fire when the cars are overturned, is not unconstitutional. *Gause v. Railroad*, 2 Rep., 44.  
369

The act should not be so construed as to destroy its force as a remedial and preventive statute. *Ib.*

Under said statute a common informer, though entitled to one-half the penalty, cannot maintain the action in his own name, but that action must be brought in the name of the state of Ohio. *Ib.*

#### CONTRACTS—

A bond executed in Ohio, negotiable here, if to be performed in New York, and is there delivered, is a New York contract. And such bond not being negotiable there, will be so regarded in the courts of Ohio. *Curtiss v. Hutchinson*, Rec., 19.  
19

Such a bond is subject to the same defense in the hands of an assignee as it would be in the hands of the original holder. *Ib.*

## CONTRACTS—Concluded—

Where a claim to recover a portion of the amount of such bond is set up by the assignee, because notes of the makers have been discounted on the credit of the bond, he must show he has a connection with the notes in some way, or produce them. It must appear they are not outstanding in the hands of another. 16.

A contract to furnish a certain number of merchantable barrel staves on the cars, at the rate of a car a week, at a specified price per 1000; *Held*, that such a contract is not an entire but a separate contract, and recovery for part may be had, the non-delivery of the rest was owing to his delinquency. The fact that the number of staves in a car be not specified, and though defendant did not refuse cars having culls in, but returned the culls, does not prevent the contract being separable. *Bletsch v. Robinson*, 2 Rep., 282. 504

A charge by the court to the jury that the contract sued on must have been made with reference to an uniform, notorious, and reasonable usage, renders immaterial a refusal to add a charge that the party must have been aware of such usage. 16.

An action to recover money paid on a verbal land contract, which has been repudiated by the vendor, is not an action on a contract for the sale of land, but for money had and received and may be sustained before a justice of the peace. *English v. Brooks*, 1 Rep., 43. 120

In an action upon a land contract for the recovery of installments that are due, it is defense that at the time of making the contract, the seller was not the owner of the premises in fee simple. *Kelchain v. Phillips*, 1 Rep., 9. 81

An agreement by B to credit the amount of A's account for labor and materials on notes which B held against A, upon B's refusal to comply, gives A a right of action for a money demand. *Wisner v. Engel*, 1 Rep., 18. 91

When words are used in a contract which involve a latent ambiguity, the conversations between the parties, at the time they are negotiating the contract, may be given in evidence for the purpose of showing the meaning which they attached to the words used in the contract, at the time it was made. *Clements v. Quarry Co.*, 1 Rep., 130. 218

In an action on a building contract for the contract price, recovery may be had on a *quantum meruit*, where the work has not been done strictly according to the contract, but substantially so, the omissions and variations being slight. *Kane v. Stone Co.*, 2 Rep., 290. 509

A petition that sets out the contract of insurance and the issuance of a policy in accordance therewith, and which alleges performance of all conditions, sufficiently states a contract. *Hughes v. Ins. Co.*, 2 Rep., 125. 412

Under a contract to ship coal, to be delivered at various times, each party to have the right to terminate the contract, in which the buyer may rescind if the coal contains too much slack, but if he continues to receive such coal without protesting or rescinding the contract, his right to claim damages for the excessive slack is waived. *Rhodes v. Coal Co.*, 1 Rep., 99. 185

## CORPORATIONS (Private.)

Where some of the defendant stockholders claim to be creditors, and ask an adjustment of their rights, and a reply of the corporation alleging that they had agreed to manage the company for a time and pay specified debts, and asking an accounting and damages for breach of the agreement, is not to be dismissed, as not proper to be settled in the case. *Morris v. Street Ry. Co.*, 2 Rep., 347. 543

A forfeiture of stock by order of the directors although doubtless good between the stockholders and the corporation, yet as to outside parties would be fraudulent and may be enjoined. *Upson v. Quarry Co.*, 2 Rep., 355. 547



- A mutual protection association is not a life insurance company, and, therefore, cannot be sued in a county where a loss has occurred, other than in the county where its principal office is located. *Rude v. Relief Ass.*, 1 Rep., 157. 244
- A stockholder, who by consent of the corporation and its creditors, gives his notes to creditors of the corporation at its request, on which judgment is had, but not yet paid, is to be considered a creditor of the corporation. 16.
- A stockholder who gives his notes to creditors of the corporation at its request, and judgment is had on them, is a creditor, though he has not paid. *Burwell v. Hazard Hame Co.*, 2 Rep., 9. 355

## COUNTERCLAIM—

- A counterclaim or set-off will not be struck off on motion, although defectively stated, if the same is capable of being so stated as to constitute a defense. *Slade v. Doolittle*, Rec. 54. 42

## COVENANTS—

- In an action for breach of covenants of title, an averment by the plaintiff that there was a prior incumbrance outstanding, which has been foreclosed and order of sale made, and sale had and confirmed to a party, a stranger to the action; *Held*, that is a sufficient averment of eviction, whether the action be on the covenant against incumbrances or of warranty. *Stow v. Gilbert*, 2 Rep., 321. 528
- In an action for a breach of warranty of land sold by defendant to plaintiff, to which defendant answers, setting up no defense whatever, no counterclaim, no set-off, such answer is of no avail and a demurrer thereto will be sustained. *Eckhardt v. Neracher*, 1 Rep., 313. 324
- Where the covenantee assumed the obligation on an outstanding mortgage, but there was an earlier mortgage under which the land was sold, and he sues on the warranty, it is no defense that the mortgage he assumed was so drawn as not to be enforceable until discharge of the prior mortgage, and that plaintiff had, nevertheless, paid it off, for he had a right to pay it off. *Stow v. Gilbert*, 1 Rep., 172. 252

## DAMAGES—

- In an action for damages brought under what is known as the Adair liquor law, the jury in assessing exemplary damages may at the same time consider the allowance of reasonable counsel fees for plaintiff. *Shafer v. Patterson*, 1 Rep., 84. 167
- The measure of damages for breach of a contract to grade a street between lands of the plaintiff and defendant, the grading to be done by defendant, is the difference between the use of the property of plaintiff for purposes for which he designed it, together with what would naturally and proximately flow from the failure to build such road. *Rock v. Stoneman*, 2 Rep., 49. 372
- In an action for damages to a buggy, caused by a negligent collision, a general averment of damages to a specified amount is sufficient without setting out the items of injury. *McFarland v. Roby*, 1 Rep., 118. 211

## DECEIT—

- If a seller's representations as to his lands, though relied on, are stated by him not to be repetitions of what others said when he bought, and he states that he never saw the land, this, if honestly said, is not actionable deceit. *Jenkinson v. Stoneman*, 1 Rep., 218. 289
- If a seller's representations as to the location and quality of his lands, though relied on, are stated by him to be repetitions of what others made to him when he bought, and he states that he never saw the lands, and knows nothing about them, this, if honestly said, is not actionable deceit. *Foreman v. Compton*, 2 Rep., 218. 479

## DEEDS—

Where B, a father, deeds his farm to a married daughter, taking back a life lease from the daughter alone, and an agreement for the support of himself and wife during life, and she commits them to the care of G, who abuses them, and she and her husband also deed G. the property, the court will restore the property to the father for life, and require G to pay B the difference between the living he did and should have furnished. *Bacon v. Gibbs*, Rec., 25. 23

For the time B was absent from G, he to be allowed such sum, for support, to be paid by G, as should be reasonable, and for the future to have the use of the farm and such other sum as might afford a reasonable support in addition—all of which to be a lien on the farm. 76

Lot No. 71, "according to Baldwin's Survey," contained 156 83-100 acres. By actual survey it contained 162 19-100 acres. By a purchase of 50 acres off the south part of Lot 71 "according to Baldwin's Survey," the purchaser is entitled but to 50 common acres and has no interest in the surplus. *Hubbard v. Carman*, Rec., 57. 44

## DEPOSITIONS—

A witness is not excused from giving his deposition under sections 338 and 339 of the code, on the ground that he is a resident of the county in which the action is pending, does not intend to depart, is in good health and intends to be present in court upon the trial. *Nashder in re.*, 1 Rep., 249. 299

## DITCH—

To sustain a parol license to maintain a ditch across the land of another, it is not sufficient to aver merely that the occupancy of the lessee was originally under a parol license for a valuable consideration, and has been for nineteen years open, visible, adverse and notorious. It must appear that it would be inequitable to close the ditch up. *Wilson v. Higgins*, 2 Rep., 411. 285

## DIVORCE AND ALIMONY—

A decree allowing alimony, payable at certain dates, on condition that the wife shall relinquish her dower in her husband's real estate, which is not described, requires no election on her part before she is entitled to the same, and she need only be ready and willing to release her claim, on request, whenever a description of the land is given her. *Coleman v. Sherwood*, 2 Rep., 211. 477

Mere fraudulent misrepresentations in a marriage contract as to name, fortune, or social standing of the parties, are not sufficient grounds for the granting of a divorce on the ground of fraud. *Meyer v. Meyer*, 1 Rep., 249. 345

It is not sufficient to constitute gross neglect that a wife, after getting all her husband's property, under a promise to make mutual wills, has become insolent and abusive and refuses to cohabit with him and has ordered him to leave the house and finally abandoned him. *Dunbar v. Dunbar*, 1 Rep., 148. 237

## DOWER—

A petition for dower under the statute in the common pleas court, is not a civil action and is not appealable. *Arneel v. Knox*, 1 Rep., 245. 313

Where a wife is divorced for the husband's aggression, and she receives a decree for alimony in money, to be in lieu of dower, which is decreed to be released, such discharge of dower does not cut her off from her right of dower in lands of the husband not given her as dower. *Foote v. Worthington*, 2 Rep., 274. 500

On divorce for the aggression of the husband, and restoration to the wife of all her lands, with power to acquire hold, manage and dispose of, etc., the husband has no estate by the curtesy or otherwise. *Neff v. Turkle*, 1 Rep., 284. 314

In an action to foreclose a mortgage made by a divorced wife, the title will be quieted against the claims of the ex-husband for curtesy, on a prayer by both mortgagor and mortgagee. 16

**EASEMENT—**

A right, or easement, which a party has no notice of, actual or constructive, does not follow the property into hands of a purchaser. *Brooks v. Massey*, 1 Rep., 66. 136

**EJECTMENT—**

The only right a person in possession without title has to recover the value of his improvements is such as the occupying claimant law gives him, and which only gives him a right, in case he is ejected, and he cannot after ejectment maintain an independent action to recover them. *Raymond v. Ross*, 2 Rep., 410. 578

Whether an action of ejectment may be maintained by the owner of the legal title as against a defendant in possession by virtue of a land contract, rescinded by the plaintiff, query. *Zoeter v. Dawson*, 2 Rep., 10. 357

A petition in such a case which does not aver that the plaintiff has complied with the terms of the contract on his part is defective. 16

Where one claiming under a sheriff's sale ejects parties claiming under a sale by the judgment debtor after sale, but before confirmation, the latter are entitled to the benefit of the occupying claimant's rights, where they are not such vendees, but there are intermediate conveyances duly authenticated and recorded. *Avery v. Royer*, 2 Rep., 201. 464

**EMINENT DOMAIN—**

If a city build a school house partially on its own lot, part of the building being on the property of a private person, such person would be entitled to the accumulation if he did not clearly assent to such building, and in condemnation proceedings the additional value must be assessed to him. *Cleveland v. Slade*, 1 Rep., 105. 194

**ERROR—**

In an action by a vendee of real estate for a rescission and judgment for the purchase money paid, and the vendor dies after judgment, his executrix is the proper person to prosecute error to such judgment. *Keck v. Jenney*, 1 Rep., 90. 173

A judgment of an inferior tribunal, as mentioned in section 6708, Revised Statutes, can be corrected for errors, not apparent on the record, by the court of common pleas, and therefore, a judgment of a justice against a married woman on her note, not given for the improvement of her estate, and which is only suable in equity, may be reversed in error though the record does not show the coverture. *Shreve v. Parrott*, 2 Rep., 52. 373

Where a petition in error was filed in the supreme court, but no *supersedeas* bond given, afterwards action was begun before a justice on an appeal bond taken in the same case before the magistrate: *Held*, that such a bond afterwards given, operated on the case, and if judgment has been rendered by the justice refusing to recognize the stay, and a transcript for execution filed, the court of common pleas can vacate the levy and order a stay of proceedings. *Wooster v. Schaaf*, 2 Rep., 379. 561

In an action on a *supersedeas* bond executed in behalf of one of the defendants, such defendant cannot set up that he has a right of action against his codefendants of the original case to compel them to satisfy the original judgment. *Hutchins v. Wick*, 1 Rep., 89. 170

**EVIDENCE—**

In an action against two persons jointly for the price of goods sold them, plaintiff may offer in evidence his books, showing that the goods were charged to both, and such evidence is competent, though the entry was made without defendant's knowledge. *McGee v. Organ Co.*, 2 Rep., 220. 481

## EVIDENCE—Concluded—

- The real contract by which an indorsement in blank was made, may be shown by parol evidence. *Worthington v. Smyth*, 1 Rep., 395. 574
- Parol evidence is admissible to show that the consideration of one dollar recited in a bill of sale is in fact a larger amount. *Hicks v. Cubbon*, 2 Rep., 121. 408
- It is competent to refer to statements of fact contained in another court, so as to make them a part of the defense in which they are referred to, in order to avoid repetition, but a reference to such facts as "for the reasons hereinafter stated" does not contain conclusion of fact. *Ketchum v. Phillips*, 1 Rep., 9. 81
- The production of books and papers by the opposite party, as provided for by section 360 of the code, (§ 5289, R. S.), does not authorize compulsory production in an examination of the adverse party before a notary before trial, but refers to this production at the trial either before the court or a master or referee. *Kelley v. Ingersoll*, 1 Rep., 210. 284
- In an action for damages caused by the negligence of defendant in hitching a fractious horse in his delivery wagon, a question as to what the driver said regarding the character of his horse, to which he replied that he had a "green" horse is not competent, as such declaration of a mere agent is not part of the *res gestæ*. *Mills v. Grasselli*, 1 Rep., 82. 161
- It may be shown by parol evidence that one apparently an indorser on a note is really liable as principal debtor, and that no demand and notice was necessary in order to make such party liable. *Stark v. Benton*, 2 Rep., 107. 401
- The admissions of testimony in rebuttal which would properly have been evidence in chief, is not ground of reversal. *Kane v. Stone Co.*, 2 Rep., 290. 509
- It is not error to exclude a question asked of the city's civil engineer as to whether the city has adopted a system of sewerage, and districted the city for that purpose; such fact should be proved by the ordinances of the city, to that effect. *Cleveland v. Beaumont*, 2 Rep., 172. 444
- Parol evidence is not admissible to show that a written subscription to a railway payable on completion, was given in consideration of certain culverts and bridges to be put in at the defendant's farm, as promised by the soliciting agent. 551

## EXECUTIONS—

- Defendant having in his hands an execution against G, after having received a bond of indemnity, levied the execution on goods in plaintiffs' store as property of G, and closed the store, and held the goods for a month, and until on trial of right of property, on which the property was found to be plaintiffs', when it was delivered up to them. *He'd*: Defendant was liable for the injury sustained by plaintiffs as at common law, and must make good to them the damages. *Searles v. Abbey*, Rec., 63. 48
- The rule of damages is the injury done to the property, or loss of any of it while in the sheriff's hands, including the depreciation of it; to which amounts interest on the whole value of the property which was held by the defendant is to be added. 16
- For injury to business, or salary of clerks, or store rent during the time the levy subsists, no recovery can be had against the sheriff. 16
- Under section 459 of the Code, in a proceeding in aid of execution, nothing can be done further than examine the judgment debtor. No further order can be made when it appears that a third person has a claim on the property sought to be subjected: his right can be affected only by a trial by a court or jury, in the ordinary way. *Stone v. Smith*, Rec., 91. 68
- Where a levy of execution is made by a sheriff on a stock of goods belonging to a judgment debtor, and subsequently a constable levies on the same goods, subject to the sheriff's levy and with the sheriff's consent, such second levy is good. *Benedict v. Deckland*, 1 Rep., 83. 163

EXTRADITION—

In order that a person may be classed as a fugitive from justice, the commission of the criminal act with which he is charged, must have been committed by him in the state that charges him with the act. In other words, he must have come *bodily* within the jurisdiction and under the power of their laws at the time he committed the offense. *Nolze v. Wilcox*, 1 Rep., 51. 125

FALSE IMPRISONMENT—

A railway corporation may be held liable on an action for false imprisonment. *Nichols v. Railroad*, 1 Rep., 268. 306

FIXTURES—

Partitions, platforms, tables and furnace registers are fixtures and cannot be removed; but the portable furnace connected only by pipes to the registers, counters nailed to the floor, shelving and drawers, are chattels and are removable. *Paine v. Coffin*, 1 Rep., 1. 351

FRAUD—

Placing property in the hands of trustees for the benefit of creditors, negates the idea of fraud. *Wickham v. Dillon*, Rec., 79. 60

Averment of damages resulting from the commission of an act of fraud, is a statement of a fact, and though perhaps open to a motion so as to show how the damages were caused, yet the averment of the fraud and consequent damages is good on demurrer. *Jenkinson v. Stoneman*, 1 Rep., 218. 289

GUARDIAN AND WARD—

Where the ward was a married woman, and there was no agreement with her guardian that her separate estate should be liable, and as the law imposes the obligation on her husband, board for the ward, her husband and children, by the guardian, cannot be charged in his account. *Dangleheisen v. Alexander*, 2 Rep., 319. 532

A petition by a son, a minor, against his father, who as his guardian, had made a pretended sale and got this property himself, is not open to a motion to compel plaintiff to state when he became of age, so that the applicability of the statute of limitations may be known, for such date pertains only to the defense and not to the plaintiff's case. *Anonymous*, 1 Rep., 148. 234

In an action attacking the judgment rendered in a replevin action, a defense that the judgment is void because defendant was a minor and no guardian *ad litem* was appointed, is demurrable, for such defense attacks the judgment collaterally. *Taylor v. Graves*, 1 Rep., 178. 261

A guardian has no right to despoil the real estate, and if he sells a barn on it and the buyer takes it down and away, the buyer is liable, and the guardian is also held to be a co-trespasser. *Johnson v. Meyer*, 2 Rep., 81. 383

The possession of a guardian of the real estate of his ward is the possession of the ward, so as to sustain an action of trespass by the ward, by his next friend, for a trespass committed under an unlawful permission by the guardian. 16

HABEAS CORPUS—

In a proceeding on *habeas corpus*, for the discharge of a prisoner from arrest on a warrant of extradition issued by a governor in compliance with the requisition of a governor of another state, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding state. *Nolze v. Wilcox*, 1 Rep., 51. 125

## HOMESTEAD—

- Where the property from which the exemption is claimed is a quantity of brick, it is sufficient to select \$500 worth of brick without picking out the particular brick or portion of the pile. *Hall v. Brown*, 1 Rep., 9. 80
- A debtor has the right to select in lieu of homestead the personalty levied on by an execution, and such debtor may replevy the personalty without regard to the fact that he may have other property which he refuses to dis-close. *Clark v. Hicks*, 2 Rep., 129. 413

## HUSBAND AND WIFE—

- Where a married woman and her husband, in payment of goods sold to her, convey her land subject to a mortgage, and covenants in the deed to pay the mortgage judgment against her on the covenant may be had, although she and her husband also convey other lands of hers to secure the payment of such incumbrance. *Hubbard v. Harris*, 2 Rep., 403. 577
- In an action against the maker of a note, a married woman, in order to charge her separate estate, the petition must aver that she had separate property at the time the action was instituted, but averring that she had separate property when the note was executed is bad in demurrer. *Wilcox v. Zimmerman*, 1 Rep., 75. 150
- In an action against a woman, the maker of a note, an answer that at the time of making the note and of answering, she is a married woman, the wife of a person named, is not demurrable. 76
- In a petition against a husband and wife on an account, it is necessary, in order to have judgment against the wife, to aver that she intended to charge her separate property and that she is possessed of separate property. *Roskoph v. Coates*, 1 Rep., 60. 135
- An action to charge the separate property of a married woman doing business with her husband, for a bill of goods sold to them, need not make him a co-defendant. *Fisher v. McMahon*, 1 Rep., 18. 93
- The separate property of the wife is liable for a bill of groceries, where she and her husband are carrying on the grocery business. 76
- No judgment can be recovered against a married woman on a contract with a real estate broker to pay a commission for the sale or exchange of her separate real estate. *Hills v. Lambert*, 2 Rep., 305. 520
- Where a married woman buys certain real estate, assuming a certain mortgage as part of the purchase money, she becomes liable for the debt, and therefore her grantees purchasing such premises and assuming the mortgage, are bound to pay it. *Brewer v. Maurer*, 2 Rep., 155. 433
- Where a married woman contracts to buy real estate and is in possession, but has ceased to make the agreed payments, equity will give a remedy to the vendor's executor. *Brooker v. Grossman*, 1 Rep., 177. 258
- A wife may maintain an action against any one who shall deprive her of the services, affections, etc., of her husband; and if the husband, after divorce, marry his seductress, he becomes liable to such action. *Scheurer v. Scheurer*, 1 Rep., 233. 297
- An undertaking on the part of the wife to charge her separate property with the payment of a debt need not be in writing. *Fisher v. McMahon*, 1 Rep., 14. 87
- If it was in writing there is no law making it necessary to attach it to the petition. 76
- In an action to recover a debt due the wife, she and her husband may join as plaintiffs, and a joint judgment in such action may be rendered in their favor. *Carter v. Reinheimer*, 1 Rep., 75. 148
- Liability of married woman on an agreement to assume payment of mortgage upon real estate purchased by her, and of her grantee who assume to pay the mortgage. *Maurer v. Brewer*, 1 Rep., 348. 345
- A married woman cannot prosecute or defend by next friend, and her husband must be joined where she cannot sue alone. *Anderson v. Pack*, 4 Rep., 260. 495

A married woman deposited a sum of money with C. & B., bankers, and thereafter in an action instituted by third parties against the husband alone, an attachment was issued and process in garnishment served upon C. & B. and upon the wife. Pursuant to an order of the court in such action, the court finding that the deposit in the name of the wife was in fact a credit of the husband, C. & B. paid said sum into court. In an action subsequently brought by the wife to recover of C. & B. the amount of the deposit, *Held*, That such payment by C. & B. did not constitute a valid defense, she not having been a party to the previous action.—Crumb v. Treiber, 2 Rep., 257. 492

A petition alleging that a married woman owns separate real estate, and that she buys goods in her own name, and that she agreed to charge her separate estate with the purchase of the goods; *Held*, that an answer denying that she ever agreed or intended to charge her separate property, is bad on demurrer, as this would be a mere denial of a conclusion of law, as deduced from the facts alleged and admitted in the petition and answer. Sand v. Sire, 2 Rep., 329. 533

Where a wife gives a bill of sale of her husband's property, in his presence, it is error to charge that such bill of sale is as binding on the husband as if he had signed it; as this fact is for the jury to determine as a matter of estoppel. Hecks v. Cubbon, 2 Rep., 121. 408

#### INDICTMENT—

Inserting in an indictment the date of the commencement of a term at which it was found, and after it has been returned by the grand jury, is an immaterial amendment, and does not affect the indictment. Smith v. State, Rec., 62 48

A material defect can be remedied only by a new indictment. *Ib.*

The prosecuting attorney of the police court need not swear to an information filed by him for the violation of a city ordinance. O'Brien v. Cleveland, 1 Rep., 100. 189

#### INJUNCTION—

In an action against a corporation to subject unpaid subscriptions, a temporary injunction against the directors will not be dissolved where part of the officers are insolvent, the solvency of the company doubtful, and as it is uncertain, if allowed to collect the unpaid subscriptions, they will apply them properly. But a receiver will not be appointed where bond is given that fund will go where it belongs. Upson v. Quarry Co., 2 Rep., 355. 547

#### INSURANCE, FIRE—

An action on a policy of insurance, in which the petition avers that the premises were destroyed by fire, etc., but which does not affirmatively show that the action was brought within the time stipulated in the policy of insurance, and there being no excuse alleged, the petition is defective, and demurrable. Minerick v. Ins. Co., 1 Rep., 134. 228

When a policy of insurance contains a proviso that no suit or action shall be sustainable against the company unless commenced within twelve months after the loss occurs, it devolves upon the plaintiff, the policy being made part of the petition, to show cause for delay if not commenced within the time specified. *Ib.*

Where the house insured is a part of a freehold described as being within the county, it sufficiently appears that the loss occurred within the county. *Ib.*

False swearing as to the amount of loss, to avoid the policy, must be wilful, and not merely inadvertent or negligent. Bank v. Ins. Co., 1 Rep., 339. 340

One to whom the loss, if any, is payable, is in no better position than the assured, and false swearing or fraud of the assured will defeat such payee, the same as it would the assured. *Ib.*

## INSURANCE, FIRE—Concluded—

Where defendant company insured for \$2,000 and there is other insurance of \$5,000, the recovery must be for two-sevenths of the loss. *Id.*

A contract of insurance is complete on the settlement of the terms with an agent authorized to contract and the policy is mere evidence, and if the agent agrees to take a note in payment of the premium, this is binding on the company. *Hughes v. Ins. Co.*, 2 Rep., 125. 412

## INSURANCE, LIFE—

Where an insurance company refuses to recognize a life policy as in force, because of the failure of the insured to comply with the provisions of the policy: *Held*, That the insured has two remedies: First, to elect to consider the policy at an end and sue for an equitable value thereof; and, second, to bring a suit to have the policy adjudged to be in force. *Ins. Co. v. Robinson*, 2 Rep., 171. 442

## INTEREST AND USURY—

The discount of a draft drawn in Ohio on a bank in New York city, "acceptance waived," having ninety-five days to run, and discounted by a branch of the State Bank of Ohio, is not usurious because the branch bank reserved interest at the rate of 6 per cent. per annum, without allowing for the difference in sight exchange. *Bank v. Williams*, Rec., 92. 69

Such transaction must be governed by the 61st section of the law of Ohio, to incorporate the State Bank, etc., and not by section 4 of the act of 1850. *Id.*

If at the time of the discount the draft was worth more than par, it would tend strongly to show that the transaction was usurious. *Id.*

An answer of a defendant in a foreclosure suit, where the petitioner avers to have an interest, merely setting up usury in the consideration of a plaintiff's claim, without showing any interest in himself is bad, and is demurable, for he appears as a mere volunteer. *Strass v. Binder*, 1 Rep., 123. 216

A decree for principal and interest on a note bearing interest at eight per cent. payable annually, should be for the whole, on the whole amount of principal and interest computed to the first day of the term, with interest on the whole sum thereafter, at the rate of eight per cent. till paid, without annual rests. *Stoppel v. Kraus*, 1 Rep., 31. 106

## INTOXICATING LIQUORS—

A sale of intoxicating drinks to a minor under twelve years of age, as agent of S, is a sale to S, and need not be upon the written order of the parent, etc., of the minor, to render such sale lawful. *Pollard v. State*, Rec., 35. 30

## JOINDER OF ACTIONS—

An action for specific performance or equitable relief under a promise to make mutual wills, and an action for gross neglect of duty in getting and retaining all of the husband's property in reliance on such promise, and then attempting to drive him out, are not joinable in one action. *Dunbar v. Dunbar*, 1 Rep., 48. 237

## JUDGMENTS—

If the record shows a judgment confessed and execution awarded, it is sufficient, although there is no technical finding and rendition of judgment. *Simmons v. Brown*, Rec., 33. 29

A judgment confessed by virtue of a warrant of attorney authorizing judgment to be confessed in favor of the *holder* of the note, and "against —," is not erroneous because the plaintiff is not the payee, or the name of the person is blank against whom judgment may be confessed. *Leish v. Cromwell*, Rec., 38. 32



- Whether* a judgment is a lien on mortgaged premises, the mortgagor being out of possession and the condition forfeited. *Quare?* *Estep v. Adams*, Rec., 51. 40
- A judgment obtained in the absence of defendant and his counsel, when the counsel was prevented from attending the trial by sickness, will be set aside on motion, and a new trial granted. *Wickham v. Dillon*, Rec., 79. 60
- In the suit, before the code, of *W v. E*, a reference was made in the common pleas, and the referee was ordered to take, and state an account between the parties. *E* did not assent to the reference. The referee reported an indebtedness of over \$10,000 from *E* to *W*. The court, following the reference, rendered judgment for the amount found due by the referee: *Held*, such judgment is erroneous. The court should have rendered judgment on its own finding, or the finding of a jury, and this should appear from the record. *Eldridge v. Woolsey*, Rec., 59. 45
- Where a petition for a judgment on a cognovit note does not state facts necessary to give jurisdiction, the judgment will be vacated on motion. *Hower v. Jones*, 1 Rep., 257. 302
- Where the assignment of a judgment is attested by a witness, who is a non-resident, it is not necessary in proving the ownership of such judgment to prove it by a deposition of such witness, as other proof is admissible in such cases. *Hutchins v. Wick*, 1 Rep., 89. 170
- A judgment by default on an official bond, against all the defendants as principals, without stating therein which were sureties is not ground for reversal on error. *Backus v. Ins. Co.*, 299. 518
- A judgment will not be reversed on exception to a charge of the court when the bill of exceptions shows only an isolated part of the charge, which can be construed to sustain the verdict, and must have been so understood by the jury. *Harbaugh v. Bates*, 2 Rep., 98. 395
- A judgment rendered by a justice of the peace in a criminal case may be reversed on error for insufficiency of the transcript, in not showing that there was any information, plea, trial, verdict, or judgment. *Matzann v. State*, 2 Rep., 98. 394
- A judgment against George Schlotman, the name in which he contracted the debt, is a lien on land held by him as Gerhard Schlotman, his true name, as against a buyer without notice. *Mack v. Schlotman*, 1 Rep., 269. 307
- A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct, and the defendant has had actual knowledge of the pendency of the action, unless a meritorious defense to the action be shown. *Gifford v. Morrison*, 1 Rep., 77. 153
- A judgment against the seller of liquors is not a lien on the lessor's premises until so declared by judgment, and if the lessor dies, the liability abates and no lien can be taken against his heirs or devisees. *Hart v. Corlett*, 1 Rep., 92. 181
- A default judgment will be set aside where an answer offered states a perfect defense, and it is shown that the omission to file was caused by counsel being engaged in trial of a cause. *Cunningham v. Mathivet*, 1 Rep., 341. 344
- The negligence of a party's attorney in not attending to the case is not ground to vacate the judgment for casualty or misfortune. *Williams v. Heisley*, 1 Rep., 196. 273
- Judgment by default against a defendant, where defense was omitted by reason of forgetfulness of his attorney, will not be set aside, in absence of showing that the party had no adequate remedy against his attorney. *Gordon v. Cawle*, 1 Rep., 18. 92
- A motion to set aside a default judgment, on the ground that an answer could not be drawn on account of the petition being taken from the files by plaintiff's attorney, will be granted, the costs to abide the event of the trial. *Selberg v. Davidson*, 1 Rep., 194. 270

## JUDGMENTS—Concluded—

Where a mortgagor sells the land to one who assumes the debt, an action to foreclose may include claims for personal judgments against both the mortgagor and his grantee. *Stone v. Becker*, 2 Rep., 346. 541

## JUDICIAL NOTICE—

Where an indorser whose indorsement was made in another state is issued, the laws of that state cannot be judicially noticed, where the question was raised by demurrer, and as a result the laws of this state will be applied. *Worthington v. Smyth*, 2 Rep., 395. 574

## JUDICIAL SALE—

Motion to set aside master's sale because of incorrect metes and bounds in advertisement. *Kotch v. Sieplein*, Rep., 17. 88

Where an individual interest in certain lands was decreed to be sold, without a finding as to what that interest was; *Held*, that this proceeding was defective and the sale should be set aside. *Warner v. Bente*, 2 Rep., 322. 531

A transcript of the judgment of a justice is being filed in the Common Pleas for execution, and a sale of the land thereon is made, the purchaser cannot file a motion to set aside the sale on the ground of irregularity in the judgment proceedings. *Cullen v. Smidt*, 1 Rep., 43. 119

In an action to recover the price bid by a purchaser at a master's sale, the buyer cannot set up frauds practiced by co-lienholders, by which he was induced to bid more than the property was worth, after sale has been confirmed and no effort was made to have the court set aside the sale or refuse its confirmation. *White v. Raymond*, 1 Rep., 6. 79

## JURISDICTION—

Consent of parties cannot give the court of common pleas jurisdiction of a cause of which it has only appellate jurisdiction. *Ballou v. Farnsworth* 1 Rep., 17. 88

A demurrer in such a case, instead of a motion to strike from the files, is not an appearance giving jurisdiction, and does not prevent a motion to strike petition from files. 16

## JUSTICE OF THE PEACE—

A justice of the peace has no jurisdiction in an action in which it is sought to recover a payment due on a "land contract." *McNickle v. Hickox*, 1 Rep., 199. 240

An action to recover money paid on a verbal land contract, which has been repudiated by the vendor, is not an action on a contract for the sale of land, but for money had and received and may be sustained before a justice of the peace. *English v. Brooks*, 1 Rep., 43. 120

There is no provision authorizing a review of the findings of a justice, in forcible entry and detainer, as being against the weight of evidence, if therefore, there were no exceptions to rulings of law, or on evidence, or because there was no evidence to support the finding, which would make the finding against law, the justice is not obliged to sign a bill of exceptions. *State v. Harmeyer*, 1 Rep., 211. 287

## JURY—

Where a party demands a struck jury and the clerk served the panel on the parties and notified them of the time to strike, and they failed to strike during the term, such neglect waives that right, and it is too late to claim it at the trial of the cause at a subsequent term. *Hutchens v. Wick*, 1 Rep., 89. 170

It is competent for the parties by agreement to exhibit to the jury, when viewing premises, the operation of the machinery by which the injury was occasioned. *Devereaux v. Thornton*, 2 Rep., 177. 449

## LANDLORD AND TENANT—

- A tenant may recover money expended in making repairs on the premises by virtue of a contract with the landlord, by the terms of which the landlord was to repay the money, thus expended, at the expiration of the tenant's lease. *Green v. Wick*, 1 Rep., 250. 301
- Where a tenant expressly reserves a right to remove fixtures at the end of his term, all rent being paid, implied right, to make such removal is limited to the end of the term and the lessor's right to prevent removal until rent is paid is superior to a chattel mortgage. *Winslow v. Wilkins*, 2 Rep., 387. 567
- A mining contract not for a term certain, with stipulations for payment of a yearly amount until mining operations commenced, is not realty as an absolute sale of the minerals, but is a chattel capable of sale as such by the lessee's administrator. *Horn v. Bowen Bros.*, 2 Rep., 133. 419
- Nonpayment of rent does not *ipso facto* end the term, but the tenant can remove fixtures if he is in possession. *Paine v. Coffin*, 2 Rep., 1. 351
- An action for rent on a parol lease "whereby defendants became possessed of the whole of said terms," and paid the first month's rent in advance, is not open to the objection to make more definite and certain, by stating whether defendants ever took possession under the lease. *Miller v. Caskey*, 1 Rep., 148. 236
- In an action for damages for entering plaintiff's property and taking away certain personal property, defendant pleaded a license under conditions of a chattel mortgage, reply that the notes and mortgage sued on were obtained by fraud and misrepresentation, such reply is not demurrable, and is not wholly a legal conclusion, but contains an averment of fact. *Derby v. Corlett*, Rep., 210. 283
- A license, in defense of a trespass, which is procured by fraud, is no defense, and it is not necessary to expressly revoke it, hence a reply that it was obtained by fraud is not demurrable. *Id.*

## LIMITATIONS—

- Where a person agrees in writing to pay another money out of what he collects on a debt, his obligation is upon the instrument, and where he has wholly disclaimed any trust relation, such person does not hold as on a continuing trust, and after the statute of limitations has run against the writing, the liability is also barred. *Jones v. Kirby*, 2 Rep., 330. 534
- In order to make a good plea of the statute of limitations of a foreign state, the statute itself should be set forth, so as to enable the court to determine whether the allegations of the answer or plea are borne out by the language of the statute itself. *R. R. Co. v. King*, 1 Rep., 313. 325
- Where it is alleged that a person received goods and agreed to account for them, or for their proceeds, but that he appropriated them and refused to account is on a contract to account and not in tort, and a plea of four years' limitation is bad, but as to other goods taken without consent, a plea of four years' time is good. *Davidson v. Hall*, 1 Rep., 363. 350
- An action for a penalty against a foreign railway which operates a domestic road is not saved from the one-year bar of the statute of limitations by its non-residence, unless it is shown to be a lessee which has taken all the statutory steps entitling it to sue and be sued as a domestic corporation. *Crawford v. Pennsylvania Co.*, 2 Rep., 19. 359

## MARRIAGE—

- To constitute a valid marriage at common law, all that is required is persons competent to contract and an agreement to take effect immediately which need not be followed by cohabitation or an agreement to take effect in future, followed by cohabitation. *Duncan v. Duncan*, Rec., 29. 26
- It is not necessary to the validity of such marriage that it be solemnized by an officer or clergyman, etc. *Id.*
- This rule prevails in Ohio and the United States generally. In England it is altered by act of Parliament. *Id.*

## MARSHALING LIENS—

Where the owner of a tract mortgages the whole of it and then sells a part to B, who pays by assuming the mortgage and giving a mortgage on his lot for the balance, which latter mortgage the owner assigns to W, who claims that the balance of the tract should first be sold to pay the former mortgage; *Held*, that W has only such rights as existed between B and his grantor. *Clark v. Bentham*, 2 Rep., 266. 498

One who has a judgment lien upon the realty is entitled to have the personality sold first by one who has a mortgage covering both realty and personality. *Stone v. Morris*, 1 Rep., 28. 101

## MASTER AND SERVANT—

An employee is chargeable with that degree of intelligence which fits him for his employment, and he must exercise ordinary care. *Joswoyax v. Ry. Co.*, 1 Rep., 306. 317

A superior of an employee has no authority to order the latter to commit an act the doing of which would naturally or necessarily be attended with great danger to life or limb, and obedience to such order under such circumstances would be such negligence as would defeat the latter's recovery. *Id.*

## MECHANIC'S LIEN—

In order that a party may obtain a mechanic's lien on certain premises, the contract must be made with the owners, and if the lien states that the work was done under a contract with a person in possession of the premises, this would create no lien as against the owners, and this cannot be enlarged by averments in the petition that such person in possession was the agent of the owners, so as to be a contract of the owners. *Filbert v. Davis*, 2 Rep., 265. 496

A petition by a sub-contractor against the owner, under the mechanic's lien law, should aver that the materials were furnished for the particular building which he seeks to reach, and the owner may deny and disprove this, and although he may have given the contractor a copy of the attested account, still he may defend on the ground that the materials were furnished for other work. *Teachout v. Cleveland*, 2 Rep., 57. 376

## MILITIA—

An action to recover a sum paid by a military organization for the use of an armory cannot be maintained in the name of the state against a city for a failure of the latter to provide a suitable armory for military organizations existing within its limits. *State v. Cleveland*, 1 Rep., 31. 107

The only remedy in such a case is by mandamus. *Id.*

## MORTGAGES—

A mortgage delivered for record has priority over a claim by W under an *agreement* for a mortgage, although the mortgagee knew of W's claim when he received his mortgage. *Brewster v. Clough*, Rec. 27. 25

Although W's claim for a mortgage cannot prevail against the recorded mortgage, yet W's demand being for the purchase money of the land mortgaged, which was known to the mortgagee when he took his mortgage, the mortgage will be postponed to W's right under his vendor's lien, although the title which W. held to the land and sold was only an equitable one. *Id.*

A purchased land of S, and mortgaged it back for the purchase money. After the money became due, D recovered a judgment against A in the common pleas. A afterwards surrendered possession to the mortgagee, who commenced a foreclosure of his mortgage. At the same term the bill to foreclose was filed and the suit pending in said court, a second judgment was recovered against A in the same court, but recovered on a day subsequent to the commencement of foreclosure. Neither of these judgment creditors was made a party to the proceedings to foreclose. The mortgaged premises having been sold under these proceedings, and the judgments assigned to Estep, he claimed a right to redeem said premises by paying the amount of the mortgage. *Held*, plaintiff had a right to redeem as to the first judgment. *Estep v. Adams*, Rec., 51. 40

- That the second judgment having been obtained *pendente lite*, it was not necessary to make the judgment creditor party to the foreclosure. 16.
- When such right to redeem exists, no period short of twenty-one years will bar it. 16.
- On sale of property to an infant and mortgage back to secure the purchase money; the infancy of the mortgagor is no defense to a foreclosure proceeding on the mortgage. *Robinson v. Bergholtz*, 1 Rep., 29. 103
- In an action brought on the foreclosure of an indemnity mortgage given to protect a buyer against incumbrances, it is proper to set up with other claims not yet due, but which will become a lien. *Hickox v. Avery*, 1 Rep., 196. 275
- Where a mortgagee, holding several notes secured by the mortgage, assigns the first one to one person, and afterwards the others to other persons, the person who obtains the first note is entitled to priority on distribution. *Lockwood, v. Robbins*, 1 Rep., 101. 192
- A prayer in a foreclosure proceeding asking for the sale of certain mortgaged lands, to pay the mortgage debt, is sufficiently definite and certain. *Ebert v. Cubban*, 1 Rep., 43. 120
- A mortgage on real estate covers the boiler, engine and appliances attached and connected with them, used for the purpose of propelling machinery in a planing mill on the property, and no subsequent chattel mortgage can affect the original mortgage. *Stone v. Morris*, 1 Rep., 28. 101
- An answer by one of two partner mortgagors, showing that the mortgagee released the other mortgagor by indorsement on the notes, does not show an intention to discharge the mortgaged premises from liability, as there is no averment of consideration for the release, the indorsement not being under seal, the statute allowing release of one partner after dissolution does not apply, as it is not shown that the firm was dissolved, and as it is impossible to say what part of the debt remained to be enforced, no defense is shown. *Robinson v. Bergholtz*, 1 Rep., 29. 193
- In an action to foreclose a mortgage, in which plaintiff avers that defendant duly executed and delivered the note to plaintiff, and that a certain amount is due on it, sufficiently avers ownership of the note. *Sommers v. Hawkins*, 1 Rep., 219. 293
- Where a mortgagee transfers, by indorsement, the note and mortgage, without having notified the mortgagor of such assignment, the assignee of such mortgage holds it subject to all payments thereafter made in good faith by the mort. agor to the mortgagee. *Wirtz v. Leich*, 2 Rep., 89. 388
- When the buyer pays the amount of a mortgage directly to the mortgagee, the master is entitled to his poundage and has a right to return no sale, unless the purchase money is paid to him. *Harmon v. Boutall*, 1 Rep., 33. 108

#### MUNICIPAL CORPORATIONS—

- Under section 1692, Revised Statutes, it is within the power of a city to prohibit by ordinance the publication of obscene matter. *O'Brien v. Cleveland*, 1 Rep., 100. 189
- In a prosecution under a city ordinance, the certificate of the clerk of the due publication of the ordinance is sufficient proof thereof. 16
- Where a city ordinance imposes a greater penalty than it has power to impose, a sentence thereunder which is within the amount of punishment allowed by the state law is, under section 106 of the code, valid. 16
- A city is not liable in damages for an injury to a convict in a workhouse, caused by machinery with which he was compelled to work being unsafe. *Connor v. Cleveland*, 1 Rep., 257. 302
- A municipal ordinance against walking or riding with any lewd female, or to stand and converse with her on any public ground within the corporation, is not authorized by section 1692, Revised Statutes, giving power to punish lewd and lascivious behavior in the streets and other public places, and such ordinance is unconstitutional and of no legal effect. *Cady v. Barnesville*, 2 Rep., 100. 396

## NEGLECT—

Under the act of the legislature of Ohio, allowing compensation in cases where death has been caused by the wrongful act, neglect or default of another, if there be no widow or next of kin of the deceased, having a legal interest in his life, an action cannot be maintained. *Halloran v. Railroad Co.*, Rec., 12. 14

The petition must show there is such widow or next of kin of the deceased, as had a pecuniary interest in the life destroyed. *Ib.* 16

In an action for damages for personal injuries, the question of contributory negligence on the part of the plaintiff should be submitted to the jury. *Bohasiar v. Oil Co.*, 2 Rec., 337. 537

A pending action for wrongfully causing death is not abated by the death of the defendant, but survives against the administrator. *Hudson v. Eden*, 1 Rep., 122. 211

If contractors who are repairing a street borrow a steam roller from the city, and place it over night on the traveled street, the city is not liable if it frighten a horse, unless the roller was calculated to frighten horses ordinarily safe, and that he was the servant of the city, acting within the scope of his employment in putting it in a place disconnected with the work, or that the city had notice of the nuisance or obstruction and a reasonable time to remove it. *Pears v. Cleveland*, 1 Rep., 328. 328

If a horse driven by its owner become frightened at such an obstruction, and a person riding with him is injured, the contributory negligence of such owner is not imputed to such person unless such owner was his agent, or unless such person should have expostulated and got out, so as to avoid the risk. *Ib.*

Where a workman undertook to board a moving train, the order of the conductor of the train that all should get on board will not excuse the negligence of the workman. *Joswoyak v. R. R. Co.*, 1 Rep., 306. 317

In an action for damages for negligence, the issues being the negligence of defendant and contributory negligence of plaintiff, the subsequent conduct of the parties as to whether plaintiff ever complained to defendant of his being the cause of his injury is proper; or if it is not proper it is not prejudicial to the plaintiff and not ground for the reversal of a verdict for defendant. *Isaac v. Gaunt*, 1 Rep., 77. 154

## NEW TRIAL—

Where the bailiff having charge of a jury, went to them several times after their retirement, and told them to hurry as the court was waiting for them; *Heid.*, to be no ground for a new trial if it was done without corruption and not prompted by either party, and there appears to be no prejudice resulting. *Stoppel v. Woolner*, 2 Rep., 252. 489

A new trial does not lie because judgment by default was taken through negligence of counsel. *Backus v. Ins. Co.*, 2 Rep., 299. 518

An omission to certify in a default judgment, which one of the parties was surety and which principal on an official bond is not such a mistake or omission of the clerk as will support a petition for a new trial. *Ib.*

A petition for a new trial does not lie on the ground that judgment by default was taken against defendants through negligence of counsel. *Backus v. Ins. Co.*, 2 Rep., 204. 470

A new trial will be granted, where the facts show that some of the jury, before the case was submitted to them, experimented on imitating the signature of the note sued on, the defense being forgery. *Christy v. Keefer*, 2 Rep., 171. 442

## NOTARY PUBLIC—

A notary public in this state has no authority to issue a *subpoena duces tecum*, and therefore has no power to commit a witness for disobedience to such subpoena. *In re Sims*, 2 Rep., 210. 473

## NUISANCE—

A person has no right to construct steps from his house into the sidewalk so as to obstruct the passage thereon, and if he does, it is a nuisance, and the city may remove the steps or prosecute him for maintaining them. *Molhumes v. Cleveland*, 2 Rep., 236. 488

A lot at the junction of two streets marked "public ground" on the plat, being too small for "public square," will not be deemed one, and not being dedicated as a street is not a nuisance for the city to put the street commissioner's office on it. *Sargent v. Cleveland*, 1 Rep., 122. 213

## OFFICE AND OFFICER—

A doorman at a station-house is not a patrolman, and may be removed at the discretion of the board of police commissioners under the police law (73 O. L., 48), without charges being preferred against such officer. *Tilden v. Cleveland*, 2 Rep., 105. 397

## PARTIES—

The sheriff is not a proper party to an action to enjoin the collection of a judgment alleged to be void. Sec. 5015, Rev. Stat., applies only to non-residents of the state, or one who is trying to escape service of summons. *Adams v. Boynton*, 1 Rep., 352. 348

Parties who are severally or jointly and severally liable on an instrument may be sued separately although the one sued is a surety only. *Wilkins v. Bank*, 1 Rep., 78. 157

## PARTITION—

3. In a partition proceeding it is not sufficient to make the guardian alone of a minor heir defendant; but the minor must be made a party.

In an action for partition in which two petitions were filed by different parties on the same day, the latter should be stricken from the files, but not on motion, but rather by demurrer, as the statute makes the pendency of another action a ground for demurrer. *Lowe v. Maurer*, 1 Rep., 157. 243

## PARTNERS AND PARTNERSHIPS—

Where the partners, sued after dissolution, on a firm liability in tort, concur in appointing attorneys to defend, one partner cannot by notifying the others that he will not be responsible for such attorney's management, and by employing another attorney to defend himself alone, resist contribution on final accounting for his share of the expense. *Rockefeller v. Morehous*, 1 Rep., 164. 247

C purchased a stock of goods of W, and to secure the payment of the purchase money executed a mortgage on premises owned by him under an assignment of a land contract. C afterwards formed a partnership with R and R in the sale of the goods purchased. Subsequently the goods were resold to W by the partnership, the latter receiving the said notes and mortgage of C in payment. R afterwards by indorsement of the firm name, transferred two of the mortgaged notes to the plaintiff, who was a creditor of the partnership, in payment of a debt due plaintiff from the partnership. C thereafter assigned the land contract to his brother, who paid the remainder of purchase money due on the contract, and received a deed from the vendor of the contract, and made valuable improvements upon the premises. The action is for a foreclosure of the mortgage. The court, in determining the rights of the respective parties: *Held*, that R, as a member of the partnership, has authority to sign the notes and mortgages in payment of a partnership debt, and that the plaintiff obtained a perfect title to the same. *Wenham v. Campbell*, 1 Rep., 47. 122

That the making of the mortgage by C., operated as an assignment of the equitable interest which he had in the property, and the subsequent assignment of the contract operated to transfer what remained of his interest in the property. 16.

## PARTNERS AND PARTNERSHIPS—Concluded—

The plaintiff being the owner of the prior equity, it must prevail; and from the proceeds of sale the assignee of the contracts is first entitled to be reimbursed for money paid as the balance due on contract, less value of rents and profits. 76.

## PAYMENT—

Paying under protest an illegal and void street assessment placed on the tax duplicate, is an involuntary payment. *Higgins v. Pelton*, 2 Rep., 306. 521

In an action to recover back the payment of an assessment, an averment that the assessment is illegal and void is not demurrable as a legal conclusion, but is a fact to be objected to by motion for indefiniteness. *Higgins v. Pelton*, 2 Rep., 305. 521

In an action to recover installments of an illegal and void assessment paid annually, such installments do not constitute separate causes of action, so as to be separately stated and numbered. 76

## PLEADING—

It is proper, and the better practice, in pleading on several causes of action, to add at the end of all a general prayer of judgment on all, instead of appending a prayer to each cause of action. *Brainerd v. Rittberger*, 2 Rep., 154. 432

It is poor pleading for plaintiff in an action to enforce the collection of certain notes and to foreclose a mortgage securing the same, to aver that there is due and owing him from defendant a certain amount of money on said notes, as such an allegation amounts to a mere legal conclusion. *Brainerd v. Rittberger*, 2 Rep., 154. 432

A pleader can refer to a former cause of action and make it a part of a second cause of action. *Hughes v. Ins. Co.*, 2 Rep., 125. 412

An averment in a third defense by reason of the fraud and covin aforesaid practiced on this defendant, defendant is entitled to etc., is a sufficient incorporation into such defense of the prior allegations of fraud. *Ketchum v. Phillips*, 1 Rep., 9. 81

A change in the prayer of a petition without averments in the body of the petition will not make the petition good. *Dawson v. Mighton*, 1 Rep., 116. 214

A petition to collect rent in an action brought by an administrator, who has by parol leased land of intestate, into the enjoyment of which the lessee enters, is not demurrable. *Bowler v. Erhard*, 1 Rep., 173. 256

A petition for damages for injury caused to plaintiff in running a handcar while in defendant's employ, need not state the precise time and position he was in when the accident occurred, and whether he had got fully on the car or not. *Haggerty v. R. R. Co.*, 1 Rep., 124. 218

A petition to vacate a decree made at a former term, which states that the decree was made in the violation of the terms of a certain agreement, is open to a motion to make definite and certain by stating the terms of the agreement. *Hittell v. Smith*, 1 Rep., 124. 217

A petition on appeal from a justice which states a different cause of action from that before the justice, on motion should be struck from the files, but with leave to file another petition. *Ballou v. Farnsworth*, 1 Rep., 17. 88

A prayer in a foreclosure proceeding asking for the sale of certain mortgaged land, to pay the mortgage debt, is sufficiently definite and certain. *Ebert v. Cubbon*, 1 Rep., 43. 120

Petition to subject land to a lien under section 489 of code, need not aver that "said judgment was not appealed or stayed." *Aylord v. Kipp*, 1 Rep., 14. 87.

Where errors occur in a petition for partition by miscalling the names of some of the defendants, the petition ought not to be corrected by interlining an *alias* after each of the names. *Lowe v. Maurer*, 1 Rep., 157. 243



- A petition by the indorsee of a note is not open to a motion to make more definite and certain by stating the date of the transfer of the note whether before or after due. *Engld v. Canfield*, 1 Rep., 196. 274
- A petition to recover an amount for the use of certain furniture, meat, drink, candles, fire, attendance, chattels and other necessities, furnished defendant by plaintiff, is open to a motion to make more definite and certain. *Martin v. Garwood*, 2 Rep., 313. 525
- An answer denying all the material averments of the petition is defective and may be taken advantage of by motion to make more definite and certain. *Thomas v. Cline*, 1 Rep., 123. 216
- An answer in which defendant says he is ignorant as to whether plaintiff is the owner of a note sued on or indorsee of it, and therefore denies the same, is good and there is no way to avoid this sort of dilatory answer. *Roberts v. Glenn*, 1 Rep., 194. 269
- Where two causes of action are pleaded in one count, such objection cannot be taken advantage of by demurrer to each, or a general demurrer must be overruled, if anything in the count constitutes a cause of action. *Brooker v. Grossman*, 1 Rep., 177. 258
- A denial of all the averments of the petition in manner and form as therein stated will be stricken off on motion, but a demurrer is not a proper method of raising its sufficiency. *Lawrence v. Cooley*, 1 Rep., 178. 261
- Error in sustaining a demurrer to a cause of action in a petition is not ground of reversal, if on the trial the cause of action was gone into and a verdict rendered against it. *Hart v. Corlett*, 1 Rep., 92. 181
- The omission of the words plaintiff and defendant from the names of the parties in the caption of the petition, does not open the petition to a motion to strike it from the files. *Hogan v. Capener*, 1 Rep., 174. 256
- The statutory provisions requiring that a motion, before a justice, to open up a judgment, be in writing, stating the grounds, and that it be verified, may be waived by the party on the other side and an oral motion consented to is good. *Stone v. French*, 1 Rep., 69. 141
- Where a defendant moves for judgment on the pleadings, consisting of the petition and answer, before a reply has been filed: *Held*, that it is within the discretion of the court to allow a reply to be filed, and overrule the motion. *Scott v. Hudson*, 2 Rep., 97. 392
- A motion to strike out part of an answer, and part of the matter moved to be stricken out is good, the motion asks too much and will be overruled. *Ambush v. Ford*, 1 Rep., 149. 238
- Filing a demurrer and at the same time a motion to strike off an amendment for a non-compliance with a former order of court, cannot be permitted; the demurrer raises an issue of law, and hence would waive the motion. *Wyman v. Hayes*, 1 Rep., 178. 282
- Where a petition discloses facts enough to show that there is no jurisdiction of the person, then a demurrer may be interposed; but wherever it does not so disclose it, and the fact exists, then a plea to the jurisdiction must be taken by way of answer, and in no case can this question be disposed of by motion. *Rude v. Relief Assn.*, 1 Rep., 157. 244
- Where a motion to separately state and number the causes of action is made, an interlineation by uniting the number of the causes of action, is not a proper compliance with the order of the court. *Elizabeth v. Morrison*, 1 Rep., 195. 271
- A motion to strike out an entire defense as being redundant and irrelevant, where there are several, is bad, for such motion supposes there is something in the defenses, or in the action, that is good. *Bank v. Marbach*, 2 Rep., 307. 524
- A petition on a note against a maker and indorser, and to foreclose a mortgage securing it, given by the maker, and also to subject the separate property of the indorser, a married woman, which she had agreed to charge with the payment of her indorsement, contains three causes of action, which must be separately stated and numbered. *Roberts v. Glenn*, 1 Rep., 46. 121

## PLEADING—Concluded—

A reply which contains a general denial of all matters set out in the answer, and an estoppel to the claim set up in the cross-petition, contains two defenses and should be separately stated and numbered. *French v. McConnell*, 1 Rep., 187. 268

Defenses of a tenant by the curtesy to a claim that he had forfeited the land by not paying taxes, that the land was his and put in his wife's name for convenience only and that he had redeemed from the tax sale, must be separated and numbered, being separate and distinct defenses. *Smith v. Smith*, 1 Rep., 117. 209

A verification to an answer by one as "attorney of the defendants," means as attorney of all the defendants. *Jirava v. Brieska*, 1 Rep., 227. 296

Where an attorney verifying a pleading sets out in his affidavit that all the matters and things contained in the pleading are within his personal knowledge, is a sufficient reason why the affidavit was not made by the party. *Id.*

A verification of a petition by plaintiff in which he merely says that the matters and things herein set forth are true, without referring to the petition as his petition, is not sufficiently definite and certain; but while a motion is pending to strike such petition from the files, a default judgment is taken, which is now asked to be set aside, a new petition and summons is not necessary, but the decree will be set aside, and the verification amended. *Lannert v. Pies*, 1 Rep., 210. 232

## PLEDGE—

The mere agreement between a pledgor and a pledgee that the latter may sell the property at either public or private sale, does not authorize the pledgee to sell without giving notice to the pledgor, so that he may have an opportunity to redeem. *Lester v. Hieman*, 1 Rep., 52. 132

## PRACTICE—

Merely numbering the paragraphs of an answer is not good practice, and is not the proper way to separately state and number the defenses. *Wisenogle v. Powers*, 1 Rec., 141. 232

It is the practice, in the absence of a code provision, and no rule of court existing, to give as long a time to answer an amended petition as the original. *Cunningham v. Mathivet*, 1 Rep., 341. 344

A petition on an appeal bond is not open to a motion to make the petition more definite and certain by attaching a copy of the bond, for the bond is no part of the petition; the motion should be to require a copy of the bond to be attached. *Safford v. Merrill*, 1 Rep., 147. 233

A dismissal for want of prosecution will be opened where plaintiff had previously died and his administrator did not know of the action and the attorney supposed the administrator would take charge of it. *Wyman v. Hayes*, 1 Rep., 178. 262

After the closing argument had begun, the state was not allowed to call a witness to rebut proof of an *alibi*. *State v. Dugan*, 1 Rep., 18. 92

## PROBATE COURT—

The probate court has *jurisdiction* to settle the rights of parties to money paid into said court, in cases where proceedings have been had therein for the appropriation of lands by a railroad company. *Railroad v. Johnson*, Rec., 89. 67

## PROCEEDINGS IN AID OF EXECUTION—

In a proceeding in aid of execution, before a referee, under the 459th section of the code, a witness is subpoenaed by the clerk of the court of common pleas to appear before the referee to testify, no order having been made by the court for the examination of witnesses, other than the judgment debtor, and the witness refuses to appear in obedience to the subpoena, *Held*, that the referee in such proceeding can examine such witness on *oath* as may be ordered to appear before him by the court. *Harman v. Waller*, 1 Rep., 26. 97

That the subpoena issued by the clerk of the court was not an order of the court, and the witness was not bound to obey the same, and therefore not liable to be attached as for a contempt. *Id.*

Where a referee finds that a third person not a party has money of the debtor: *Held*, that the court cannot order it paid into court, and where a fourth party also claims it, the fact that he was examined as a witness does not conclude him or affect his claim. *Id.*

A refusal of a court to confirm the finding of a referee appointed by the common pleas court, in proceedings in aid of execution, is not a final order which can be reviewed on error. *Harman v. Waller*, 2 Rep., 185. 455

#### PUBLIC WORKS—

An action for injury to the canals must be in the name of the state, but where the lessees of the same aver that the city has allowed its drains to run into the canals, and thereby entailing a great expense on such lessees in keeping the canal in proper condition for navigation: *Held*, that such petition does not merely state a cause of action for injury to the canal, but also a cause of action for injury to the business of such lessees, and that for this they could sue in their own names, and therefore a general demurrer to such petition will be overruled. *Lessees v. Cleveland*, 2 Rep., 58. 378

#### QUIETING TITLE—

The vendee of a judgment debtor, who has not paid the purchase money, but has received a conveyance from the judgment debtor, cannot sustain a bill to quiet his title against a purchaser of the land under a judgment rendered after the contract of sale, unless he has paid or brings into court the purchase money. *Butler v. Curtis*, Rec., 96. 92

#### RAILROADS—

Where a child of six years is playing near where trains of cars of a railroad company stop and move on at short intervals, the company does not discharge its duty toward such child by simply ordering it away, but it should send it away. *Devereaux v. Thornton*, 2 Rep., 177. 449

If a fence around a railroad track, though not in a place where cattle are, is a protection in keeping out human beings, the fact of its absence imposes a higher degree of care on the company. *Id.*

Where one railroad runs over the track of another, they are jointly liable for an injury resulting from their failure to fence such track, and it is neither misjoinder of action nor parties to sue both jointly for the injury as a single cause of action. *Berchold v. R. R. Co.*, 1 Rep., 314. 327

#### RECEIVERS—

Receiver of an insolvent corporation cannot, as such officer, bring action to subject the statutory liability of stockholders of such corporation, to payment of its debts. *White v. Ingersoll*, 2 Rep., 362. 549

#### RECORDS—

The requirements of law as to making up and signing the records of the common pleas are only directory, and the proceedings are valid without such making up and signing. *Simmons v. Brown*, Rec., 33. 29

#### REFERENCE—

Where the referee is not to report all the testimony, it is necessary, as to the findings of fact, before the court will review his report, to file a bill of exceptions, setting out all the testimony. *Arter v. Chapman*, 1 Rep., 226. 294

The trial of a case before a referee or special master is substantially the same as a trial before the court, and the report of such referee or special master cannot be reviewed unless the evidence is *all* submitted for the consideration of the court. *Id.*

## REFERENCE—Concluded—

In order to review exceptions to evidence, on a trial had before a referee, a bill of exceptions is necessary, as a referee's trial is conducted and reviewed the same as a trial by court. *Burwell v. Hazard Hame Co.*, 2 Rep., 9. 355

## REPLEVIN—

In replevin, before a justice of the peace, where the property is appraised at over \$100, the justice has no jurisdiction to try the case, and if he proceeds to final judgment, and an appeal is taken to the common pleas, after judgment in the common pleas, the case can be appealed to the district court, as the proceedings before the justice after the return of the appraisal are a nullity. *Burlenson v. Roe*, Rec., 61. 47

In a case of replevin where the plaintiff fails to appear, the defendant, with the assent of the court cannot, without the intervention of a jury, assess the damage for the defendant. *Donahue v. Holkins*, 1 Rep., 123. 215

Where the plaintiff in a replevin proceeding fails to appear, the defendant, with the assent of the court, may waive a jury, and the court finding for him may assess his damages without a jury. *Bank v. Chapin*, 2 Rep., 114. 403

A replevin case being in default, the judgment may, before it is reached for trial, send it to another room, where there is a jury, for immediate assessment of damages without notifying the defendant. *Bingham v. Hill*, 1 Rep., 74. 144

Where the verification of a petition in replevin contains all the items necessary in the affidavit for replevin, there being no other affidavit for the replevin, it is not error to hold such affidavit as sufficient to sustain the action. *Bingham v. Hill*, 1 Rep., 74. 144

## RESCISSION—

A vendee who seeks to rescind a purchase of certain property of which he has had the sole use, must offer to account for the use and what he has consumed. *Keck v. Jenney*, 1 Rep., 90. 173

A vendee praying the rescission of the purchase of property after having used it a year, and the return of the payments, cannot have a judgment by default without inquiry of damages, both as to what he paid and what defendant is entitled to have restored to him. *Id.*

In an action by a vendee of real estate for a rescission and judgment for the purchase money paid, and the vendor dies after judgment, his executrix is the proper person to prosecute error to such judgment. *Id.*

## REVIVOR—

Under section 411 of the Code (§5158, R. S.), which does not authorize a revivor within a year to be made without notice to the adverse party, and where an executor assigns, the action cannot be revived in the name of his successor without notice to the adversary party. *Bishop v. Stoddard*, 1 Rep., 201. 276

## ROADS—

Though the mere non-user of a road for a period less than twenty-one years may not amount to an abandonment, yet where the facts show that it was agreed that an owner should dedicate a new way, on condition that the old be closed, though the trustees had no power to so agree; yet after the new dedication, the closing of the old road will be held to amount to an abandonment. *Rittberger v. Flick*, 2 Rep., 115. 406

## SALES—

Where property is sold on condition that title is to remain in the seller until the agreed payments are made, with right to seize the property in case of default, title does not vest in the buyer until performance. *White v. Singer Co.*, 1 Rep., 43. 118

If goods ordered do not comply with the contract, the buyer should use reasonable diligence in finding this out, and should offer to return them and hold them subject to seller's order. *Leslie v. Evans*, 1 Rep., 213. 307

In offering to return goods that do not comply with the contract of sale, the offer to return must be unconditional and not coupled with an offer to exchange them for something else, exercising ownership over them. *Ib.*

Breaking into premises to carry away property by one who has sold property to another to be paid for in installments, notwithstanding property is not fully paid for, constitutes a cause of action. *Ballou v. Farnsworth*, 1 Rep., 1. 75

SET-OFF.—

One of the defendants cannot set off a separate debt against the joint debt. *McGee v. Organ Co.*, 2 Rep., 219. 481

SLANDER AND LIBEL—

Words charging a person as being a blackmailer and with having blackmailed persons before and having settled the cases, are not actionable *per se*. *Byers v. Forest*, 2 Rep., 194. 458

Words are actionable *per se* only when they impute an indictable offense, some infectious or loathsome disease, or affect a person in his office, trade or profession. *Ib.*

Words charging that the plaintiff on a certain occasion was drunk, and that he was a common drunkard are not actionable *per se*. *Coffee v. Cowley*, 1 Rep., 35. 112

It is not a misjoinder for husband and wife to join in an action for slander *per se* of the wife, as her reputation is his property as well as hers. *Anderson v. Pack*, 2 Rep., 260. 495

It is a misjoinder and demurrable to join two defendants alleging a joint speaking of slanderous words. *Ib.*

In an action for libel, allegations that defendant wrote and published a letter and setting out a copy of the letter, in substance, that the plaintiff, soon after the fire went away; that this and the amount of insurance paid caused considerable comment among the neighbors; and that an investigation might be beneficial, does not support an innuendo that a charge of arson was meant. The general statement that the defendant published false and scandalous matter, without alleging which matter of the letter it is, is too indefinite. *Reader v. Platt*, 2 Rep., 338. 540

STATUTES OF FRAUDS—

Where the defense to an action is founded on an agreement not to be performed within a year, the answer must show that such agreement was in writing. *Carter v. Reinheimer*, 1 Rep., 75. 148

Where parties to a note, twenty days before its maturity, enter into a verbal contract for the retention of the money by the maker for a period of one year, the agreement is void for the reason it is within the statute of frauds. *Jones v. Minerva*, 1 Rep., 1. 76

An oral agreement not to sue on a note for two years, in consideration of part payment of the interest in advance, does not withdraw the agreement from the operation of the statute of frauds. *Carter v. Reinheimer*, 1 Rep., 75. 148

A verbal proposition for the exchange of property, conditioned on certain modifications, and as a consequence plaintiff paid down money to bind the bargain, for which defendant gave a receipt: *Held*, that this receipt still leaves it necessary to prove by parol that defendant accepted the proposition, and therefore does not satisfy the requirements of the statute of frauds. *Boest v. Doran*, 2 Rep., 313. 525

## STREET RAILWAYS—

Where a street railway is bound to pave the track between the rails when required by the city, and the city by ordinance levies an assessment on the track and franchises of such railway for the cost of such work, such assessment is not for the mere collection of a contract debt. *Cleveland v. R. R. Co.*, 1 Rep., 304. 315

The franchises and tracks of a street railway are land within the meaning of the assessment laws, and subject to the same burden as non-abutting land. 16.

## SUMMONS—

Service by leaving a copy of summons at the church, the defendant being an unincorporated association formed for the purpose of religious instruction, is not a proper service under the statute. *Hicks v. M. E. Church*, 1 Rep., 14, 85

## SURETIES—

In an action against a principal and sureties on an official bond, interest as well as principal on the amount of defalcation, may be included when the debt and interest do not exceed the penalty of the bond. *Backus v. Ins. Co.*, 2 Rep., 299. 578

In an action on the official bond of a delinquent agent, the defendant being in default, the plaintiff's attorney may waive a jury and submit the case to the court to hear the account and assess the damages. 16.

## TAXES AND TAXATION—

Where property has been forfeited to the state the taxes due at time of forfeiture and which have since accrued, are payable out of the proceeds of the sale, as the title to the property is in the state merely as security for taxes due and owing, and the forfeiture of itself does not pay the tax due the public. *French v. McConnell*, 2 Rep., 369. 551

A public library association for the diffusion of knowledge by books, etc., open to all persons on equal terms, is an institution of a purely public charity, and exempt from taxation. *Library v. Pelton*, 1 Rep., 185. 263

Rooms in the building of a library association that are rented out, the rent being applied to the repairs and to the objects of the association, are not in any sense used for profit, and are also exempt from taxation. 16.

Where a party has removed his residence to another county; *Held*, that the board of equalization could only take jurisdiction of such personal property as was situated in his former place of residence where it was at the time it was listed for taxation by the assessor, and any attempt of the board to add to such returns, made by the assessor, will be enjoined. *Wright v. Pelton*, 2 Rep., 226. 499

## TAX SALE—

Defective description upon tax duplicate. *Doe, ex. dem v. Stewart, Rec.*, 95. 72

Lien of purchaser at tax sale upon property purchased. *Sage v. Thompson*, 2 Rep., 66. 381

## TRESPASS—

A suit in equity to enjoin the commission of a trespass may, by amendment be converted into an action at law to recover damages for the same trespass and so, though the date of the trespass is not the same, when the court is satisfied that the same transaction was intended and such amendment does not make it a new and different action. *Lake Erie Ice Co. v. Rose*, 1 Rep., 118. 210

Where the trespass consists in the mere repetition of the same conduct, as digging a ditch and flooding the land, the mere fact that the trespass is laid as on different days between given dates gives no right to separating and numbering the trespasses. *Wilson v. Higgins*, 2 Rep., 73. 381

Where a will leaves real estate to the widow and heirs in certain proportions, the heirs may maintain an action of trespass without joining the widow; but can only recover for their proportion of the injury. *Johnson v. Meyer*, 2 Rep., 81. 383

#### VENDOR AND PURCHASER.—

When land is sold as a part of a subdivision, in which is a public square, the vendors cannot vacate the square, without making good to the vendees any injury sustained thereby; and such injury may be set up under the code, to reduce the amount sought to be recovered by the vendors or their assignees. *Slade v. Doolittle*, Rec., 54. 42

A provision in a contract for the sale of lands which provides that the contract shall become null and void on default of installments of payment or other conditions is not exclusive and does not prevent judgment being taken for overdue installments. *R. R. Co. v. King*, 1 Rep., 313. 325

Where a person having a contract for the conveyance of certain lands, and being in possession thereof, executes a mortgage thereon in the usual form, and afterwards assigns such contract, such mortgage is *pro tanto* an assignment of the contract, and if the assignee of the contract pays the balance of the purchase money, and takes a deed with notice of the mortgage he holds subject thereto except that his payments to the holder of the title are the prior liens. *Wiggins v. Campbell*, 2 Rec., 122. 410

Where the purchaser of the equity of redemption of property from a mortgagor does not assume the mortgage and sells the equity of redemption to defendant, who does assume and agree to pay such mortgage, the mortgagee may claim a personal judgment against him, for he received consideration for his promise. *Little v. Thoman*, 2 Rep., 291. 513

A person in possession under a contract of purchase is not bound to take notice of a mortgage which was given and placed on record after execution of the contract of purchase. *Zellar v. Marquardt*, 1 Rep., 312. 323

Statements made by a seller to induce a buyer to enter into a contract, that lots were worth \$25 per foot, but he would sell them at \$13, which was much less than the price at which other lots had been sold by him, is not an expression of opinion as to the value of the property, but an averment of fact, and if false, are a defense to an action for the purchase money. *Ketchum v. Phillips*, 1 Rep., 9. 81

Where an owner of lots contracts to sell them on monthly installments, retaining the title till all payments are made, but he afterwards mortgages them to one who has actual notice of the purchaser's possession, but the purchaser does not have actual notice of the mortgage, continues to make payments to his vendor: *Held*, that his equity is superior to that of the mortgagee and he has a prior claim as to all payments made by him since the recording of the mortgage. *Ranney v. Hardy*, 1 Rep., 130. 415

Where a purchaser of property retains part of the purchase money to provide against a supposed lien on the property, without having in any way agreed to pay it, gives the incumbrance no claim against such purchaser to pay it. *Wick v. Green*, 2 Rep., 147. 430

#### VENUE—

Where an action is commenced in a county in which one of several defendants resides, one of the defendants being an administrator who was appointed, and, at the time of the commencement of the action, resided in a county other than that in which the action is brought, the same being upon a tort alleged to have been committed by the intestate in his lifetime jointly with the other defendants, summons against such administrator may issue to the county in which he resides. *Steel v. Burgert*, 2 Rep., 377. 557

Section 10, chapter 5, 75 O. L., 611, does not exempt an administrator from being compelled to answer an action rightly brought in any other county than that wherein he was appointed or resides. 16

## WARRANT

A warrant from a police court may be signed by the clerk of the police judge; this is an issuing of it by the judge through his clerk. *O'Brien v. Cleveland*, 1 Rep., 100. 180

## WAREHOUSEMAN—

Where a warehouseman issues a warehouse receipt to one who had left certain articles on storage, and the bailor transfers such receipts as collateral to a loan, but before transferring the receipt the bailor gets back his property from the warehouse unbeknown to the warehouseman, and afterwards assigns the receipt, the assignee cannot hold the warehouseman liable. *Bank v. Burt*, 1 Rec., 106. 196

## WATER-COURSE—

A city erecting and controlling a work-house is liable in damages for the corruption of a water-course into which it has run sewage of the institution. *Cleveland v. Beaumont*, 2 Rep., 172. 444

## WATERCRAFT LAW—

An attachment against a steamboat, under the watercraft law of Ohio, will be dismissed on motion, where articles of furniture of a vessel have been seized under the attachment, if it appears in evidence that the vessel, before the seizure, was wrecked and no longer existed as a watercraft. *Insurance Co., v. Steamboat*, Rec., 10. 13

A master of vessel cannot by any contract of his, as such master, bind the vessel so as to make her liable to seizure under the watercraft law of Ohio, "providing for the collection of claims against steamboats and other water craft, and authorizing proceedings against the same by name," (Swan's Statutes, 185), when the transaction is not within the line of the master's duty. *Crawford v. Schooner Erie*, Rec., 7. 11

It is not within the duty of the master, in addition to the transportation of flour, to go ashore at the point of destination and sell the property as the factor of the owner of it. 16.

Money paid for insurance, on property shipped under such contract, and money advanced to pay for supplies for such craft, are not chargeable to the vessel. 16.

## WITNESSES—

Where a defendant is questioned as to collateral matters, his answers are binding, and contradiction is not allowed, because it injures the credibility of the rest of defendant's testimony. *Brown v. Hunkin*, 2 Rep., 281. 502

Under section 313 of the code, in a suit between administrators of different estates, heirs and legatees who will derive the chief benefit from the result of the suit, but are not parties thereto, are not disqualified from testifying in such suit. *Roland v. Griffiths*, 1 Rep., 211. 287

Where a witness gives testimony which takes the party calling him by surprise, such witness may be cross-examined as to contrary declaration, made out of court, to refresh his recollection, but his answers cannot be contradicted. But either party may prove subornation of his or the other party's witnesses. *State v. Carlyle*, 1 Rep., 338. 335

Separation of witnesses. *Stanton v. Ruggles*, 2 Rep., 9. 355















